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Supreme Court of the United States

October Term, 1978.

No. 78-1630

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX TO PETITION.

	Page
TABLE OF CITATIONS	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
The Decision Below Raises a Novel Question in the Administration of the Reform Act Which, if Unresolved, Threatens the Integrity of the Congressionally Mandated Railroad Reorganization Scheme	5
A. Introduction	5
B. The Statutory Framework	8
C. The Reform Act Authorizes Conrail, After the 180-Day Mandatory Operating Period, Summarily to Discontinue Commuter Rail Service Whenever State or Local Transportation Officials Discontinue the Requisite Subsidy	11
D. Summary Discontinuance of FSP Commuter Service Effectuates the Purpose of the Congressional Railroad Reorganization Scheme	16
CONCLUSION	22
APPENDIX:	
District Court Opinion	A1
Court of Appeals Opinion	A11
Statute Involved	A28

TABLE OF CITATIONS.

Cases: Page

Addison v. Holly Hill Fruit Products Co., 322 U. S. 607 (1944) 14, 19
Board of Trustees of Santa Maria Joint U. High School Dist. v. Judge, 50 Cal. App. 3d 920, 123 Cal. Rptr. 830 (1975) 13
Botany Worsted Mills v. United States, 278 U. S. 282 (1929) 15
Brown v. Consolidated Rail Corp., 422 F. Supp. 1251 (N. D. Ohio 1976) 10
Feldman v. Philadelphia National Bank, 408 F. Supp. 24 (E. D. Pa. 1976) 15
Flora v. United States, 357 U. S. 63 (1958) 18
Mastro Plastics Corp. v. NLRB, 350 U. S. 270 (1956) 18
McDonald v. United States, 279 U. S. 12 (1929) 16
Neuberger v. Commissioner, 311 U. S. 83 (1940) 13
Regional Rail Reorganization Act Cases, 419 U. S. 102 (1974) 5, 9
Richards v. United States, 369 U. S. 1 (1962) 18
SEC v. Joiner Corp., 320 U. S. 344 (1943) 13
Singer v. United States, 323 U. S. 338 (1945) 14
United States v. Calamaro, 354 U. S. 351 (1957) 21
United States v. Heirs of Boisdoré, 49 U. S. (8 How.) 113 (1850) 18
United States v. Pritchett, 470 F. 2d 455 (D. C. Cir. 1972) .. 13
Zuber v. Allen, 396 U. S. 168 (1969) 19, 21

Authorities:

Krutter, The Railroad Revitalization and Regulatory Reform Act of 1976: Improving the Railroads' Competitive Position, 14 Harv. J. Legis. 575 (1977) 5
G. J. Sutherland, Statutory Construction (4th ed. 1972) 13, 16

TABLE OF CITATIONS (Continued).

Statutes: Page

Regional Rail Reorganization Act of 1973, 87 Stat. 985, as amended ("Rail Act"):
Generally 2, 5, 8, 11, 15
Section 101(b)(5), 45 U. S. C. § 701(b)(5) 17
Section 208(d)(1), 45 U. S. C. § 718(d)(1) 20
Section 304, 45 U. S. C. § 744 ..... 2, 20
Section 304(a), 45 U. S. C. § 744(a) ..6, 8, 11, 13. 16, 18, 19, 21
Section 304(a)(1), 45 U. S. C. § 744(a)(1) 8
Section 304(a)(2), 45 U. S. C. § 744(a)(2) 15
Section 304(b), 45 U. S. C. § 744(b) 8, 11, 13, 16, 18, 19
Section 304(b)(3), 45 U. S. C. § 744(b)(3) 21
Section 304(c), 45 U. S. C. § 744(c) 8, 11
Section 304(d), 45 U. S. C. § 744(d) 9, 11, 19
Section 304(e), 45 U. S. C. § 744(e) 7, 9, 18, 19, 21
Section 304(e)(1), 45 U. S. C. § 744(e)(1) 9
Section 304(e)(2)(A)-(D), 45 U. S. C. § 744(e)(2)(A)-(D) 9, 10, 11, 12, 13
Section 304(e)(4), 45 U. S. C. § 744(e)(4) 10, 15, 16
Section 304(e)(5)(A), 45 U. S. C. § 744(e)(5)(A) 9
Section 304(e)(6), 45 U. S. C. § 744(e)(6) 16
Section 304(f), 45 U. S. C. § 744(f) 8
Section 304(g), 45 U. S. C. § 744(g) 10, 13, 14
Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31 ("Reform Act") 2, 5, 9
28 U. S. C. § 1254(1) 2
28 U. S. C. § 1331 3
28 U. S. C. § 1337 3
49 U. S. C. § 10908 6
49 U. S. C. § 10909 6
49 U. S. C. § 10362(b)(5) 7, 17

Regulations:

RSPO Standards for Determining Commuter Rail Service Continuation Subsidies, 49 C. F. R. § 1127, *et seq.* 11, 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Consolidated Rail Corporation ("Conrail"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above proceeding on December 29, 1978.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 589 F. 2d 1327 (7th Cir. 1978), and the opinion of the United States District Court for the Northern District of Illinois, Eastern Division (Will, J.), not yet reported, are set forth in the Appendix hereto at A11 and A1, respectively.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 29, 1978. A timely petition for rehearing was denied on January 25, 1979, and this petition for certiorari was filed within ninety (90) days thereafter. This Court's jurisdiction is conferred by 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

Whether in the absence of any financial assistance from state or local governments the Railroad Revitalization and Regulatory Reform Act of 1976 permits the discontinuance of rail commuter passenger service without submission to the Interstate Commerce Commission.

STATUTE INVOLVED.

The relevant statutory provision, 45 U. S. C. § 744, is set forth in the Appendix hereto at A28.

STATEMENT OF THE CASE.

On April 1, 1976, the rail line between Chicago, Illinois and Valparaiso, Indiana was conveyed to Conrail, a for-profit corporation organized pursuant to the Regional Rail Reorganization Act of 1973, as amended ("Rail Act"), to acquire rail property and operate service over routes designated by the United States Railway Association ("USRA") in its Final System Plan ("FSP"). From April 1, 1976 to September 27, 1976, a period of 180 days, Conrail operated the Valparaiso-Chicago passenger service over that line in accordance with Section 804 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("Reform Act"), 45 U. S. C. § 744, which required continuation of rail passenger service for the first 180 days following

conveyance. From September 27, 1976 to September 30, 1978, Conrail operated the Valparaiso-Chicago service upon successive offers by agencies of the State of Indiana [1] to pay the subsidies required by the Reform Act as a precondition to Conrail's obligation to provide passenger service. Since October 1, 1978, Conrail has operated the Valparaiso-Chicago passenger service without subsidy in compliance with the permanent injunction entered by the court below, and is, accordingly, incurring substantial costs in contravention of the statutory scheme of the Reform Act.

In anticipation of the termination of financial assistance, on August 1, 1978, Conrail timely posted and mailed the requisite Notices of Discontinuance ("summary discontinuance") for the cessation of the Valparaiso-Chicago commuter service as of October 1, 1978. On September 21, 1978, the State of Illinois filed a complaint in the district court invoking that court's jurisdiction under 28 U. S. C. §§ 1331, 1337 and seeking to enjoin the proposed discontinuance. After a hearing on September 29, 1978, the district court entered a temporary restraining order, prohibiting the discontinuance of the service. Following a second hearing on October 6, 1978, the district court, concluding that subsidization by an appropriate authority is a "*sine qua non*" of continued rail commuter passenger service after the post-conveyance 180-day mandatory operating period, vacated the temporary restraining order and dismissed the plaintiffs' complaint.

On October 10, 1978, the United States Court of Appeals for the Seventh Circuit granted plaintiffs' application for a stay of the district court order pending appellate review. On December 29, 1978, the Court of Appeals (Circuit Judge Bauer, dissenting) reversed the district

1. Those agencies were the Northwestern Indiana Passenger Transportation Authority, the Public Service Commission of Indiana and, finally, the Northwestern Indiana Regional Transportation Authority.

court, concluding that the Reform Act does not authorize Conrail "summarily to discontinue rail passenger service over an FSP line." Subsequently, on January 25, 1979, the Court of Appeals denied a petition for rehearing filed by Conrail.[2]

2. On February 15, 1979, Conrail filed with the Interstate Commerce Commission a request for discontinuance of the Chicago-Valparaiso service at issue herein. On March 9, 1979, the Commission denied without prejudice Conrail's request, finding noncompliance with the Commission's regulations. Finance Docket No. 28054F, *Consolidated Rail Corporation (Conrail)—Discontinuance of Trains Nos. 453, 454, 455 and 456 Between Valparaiso, Ind. and Chicago, Ill.* On April 17, 1979, Conrail filed another request for discontinuance of the service in question.

REASONS FOR GRANTING THE WRIT.

The Decision Below Raises a Novel Question in the Administration of the Reform Act Which, if Unresolved, Threatens the Integrity of the Congressionally Mandated Railroad Reorganization Scheme.

A. Introduction.

Both the Rail Act[3] and the Reform Act reflect a Congressional attempt to restructure the Northeast and Midwest rail system and to develop a national transportation policy. While "refining" the then-existing regulatory structure, the Reform Act also represented an attempt to "substitute competition for regulatory control"[4] and to relieve Conrail of at least a portion of the burden of federal economic regulation by the Interstate Commerce Commission ("ICC"). In addition, the Reform Act shifted the

3. The Rail Act embodied Congress' first comprehensive response to the rail crisis that threatened the national welfare, the stated purpose of which was "to salvage the rail services operated by seven insolvent . . . railroads in the Midwest and Northeast region of the Nation" and replace them with a "viable" rail services system. S. Rep. No. 601, 93d Cong., 1st Sess., *reprinted in* [1973] *U. S. Code Cong. & Ad. News* 3242. Rather than merely subsidize the bankrupt railroads, Congress created a structure, which included USRA, Conrail and the Rail Services Planning Office ("RSPO"), for the planning, ownership and management of the regional rail system. RSPO was directed, *inter alia*, to assist the Northeastern states in planning support for local rail services. *See Regional Rail Reorganization Act Cases*, 419 U. S. 102 (1974).

The Rail Act was designed to promote an efficient rail transportation system by, *inter alia*, liberalizing procedures governing the discontinuance of rail services and the abandonment of rail property. As discussed in the text, *infra*, pp. 8-10, the Reform Act significantly amended the existing discontinuance and abandonment procedures.

4. Krutter, *The Railroad Revitalization and Regulatory Reform Act of 1976: Improving the Railroads' Competitive Position*, 14 Harv. J. Legis. 575, 584 (1977).

authority to regulate commuter services provided by Conrail after April 1, 1976 from the ICC and state public utility authorities to the RSPO.

The Court below placed significant weight on the fact that the choice confronting it was "procedural". Because of the divergent ownership of rail lines used by Conrail to provide commuter service, the "procedural" alternative adopted does not provide an effective discontinuance remedy. Relying heavily on the concept that Section 304(a) of the Rail Act, 45 U. S. C. § 744(a), literally applied only to rail lines not conveyed to Conrail, the Court of Appeals concluded that commuter service operated over such lines could not be discontinued under the summary procedures of that section.

While it is correct that the rail lines used here to provide commuter service were designated in the FSP for conveyance to Conrail (*See* n. 6, *infra*, p. 9), in other instances, Conrail provides commuter service over rail lines in whole or in part not owned by Conrail. The effect of the lower court's decision, taken to its logical conclusion, would permit Conrail to employ the summary discontinuance procedures only where rail lines were not otherwise conveyed to Conrail and to require resort to the Interstate Commerce Commission or state regulatory authorities where the lines were acquired by Conrail. Because the great bulk of commuter service provided by Conrail is regional in nature, if a subsidy payment from a regional transportation authority were not forthcoming, in order to discontinue service, Conrail could thus be required to resort to two types of ICC procedures under 49 U. S. C. § 10908 (interstate service) and 49 U. S. C. § 10909 (intrastate service), in addition to employing the notice procedures of Section 304(a) to the extent Conrail did not own the rail lines over which service had been provided. Indeed, the anomaly is further evidenced by the fact that

a single train could traverse both owned and non-owned property, and therefore be partially halted under the notice procedures and partially halted only after resort to the ICC or state authorities. These divergent procedural requirements amply demonstrate the very reason for the enactment of Section 304 and establish that the lower court misconstrued Congressional intent by erecting significant barriers to the implementation of the Rail Act commuter regulatory design.

Further, to put in financial perspective the totality of the commuter problem, the deficit (operating loss) for all Section 304(e) commuter rail passenger services operated by Conrail on behalf of Indiana and other state and local transportation authorities in the northeastern United States in 1978 was $96,873,367. It is this deficit which under the Rail Act is to be subsidized by the appropriate transportation authorities as a precondition to Conrail's obligation to provide passenger service. In conformity with Congress' essential dictate that Conrail's freight revenues not be used to "cross subsidize" passenger service, 49 U. S. C. § 10362 (b)(5), the Reform Act and the RSPO Standards (*infra*, p. 1_) provide an orderly procedure whereby in the absence of receipt of a binding offer of financial assistance, Conrail is able to post notices 60 days prior to the end of a current subsidy period and discontinue service at the end of that period.

Only thus may the financial loss to Conrail from commuter service be avoided when a state or local agency, like Indiana, has determined no longer to subsidize the service. The restructuring of the statutory scheme imposed by the court below erodes the fundamental financial structure of the Rail Act with potentially disastrous impact upon Congress' prohibition against cross subsidization. The confusion and conflicting procedural and subsidization stand-

ards which might thus evolve could well preclude a prompt and uniform means by which Conrail could avoid exposure to financial loss.

By requiring Conrail to obtain ICC or state regulatory approval of the discontinuance of unsubsidized commuter rail services, and thereby divesting RSPO of its statutory authority to regulate that service, the Court below has created a regulatory relationship not contemplated by either the Reform Act or the Interstate Commerce Act. Accordingly, if allowed to stand, the Seventh Circuit's decision will effect a fundamental restructuring of the Congressional scheme for commuter rail services and will threaten Conrail with debilitating economic consequences. As is demonstrated below, both the Rail Act and the Reform Act, illumined by their legislative history and objectives, dictate the conclusion that local subsidization is a *sine qua non* of Conrail's obligation to continue commuter rail service after the 180-day mandatory operating period.

B. The Statutory Framework.

Sections 304(a) and 304(b) of the Rail Act, 45 U. S. C. §§ 744(a), 744(b), outline the summary discontinuance and abandonment procedures that may be invoked by Conrail, subject to the limitations of Sections 304(c) and 304(f) of the Rail Act, 45 U. S. C. §§ 744(c), 744(f). Thus, Section 304(a)(1) authorizes the summary discontinuance of rail service upon compliance with statutory notice requirements. Section 304(b)(1) authorizes, under prescribed conditions, the abandonment of rail properties over which rail service has been discontinued pursuant to Section 304(a). Section 304(c) prohibits the discontinuance of rail service and the abandonment of rail property if a "financially responsible person" offers to provide an appropriate rail service continuation payment.

Under Section 304(e) of the Rail Act, 45 U. S. C. § 744(e),[5] which was added to the Rail Act in 1976 by Section 804 of the Reform Act, Conrail was required to maintain for 180 days following the April 1, 1976 conveyance, rail passenger service that was previously operated by a railroad in reorganization—without regard to local subsidy,[6] and without regard to whether the rail properties used to provide the service were designated in the FSP for acquisition by Conrail (45 U. S. C. § 744(e)(1)).[7] Section 304(e)(2), which sets forth the requirements of securing or continuing financial assistance for passenger service,[8] provides that if such financial assistance is not provided

5. Section 304(d) of the Rail Act, 45 U. S. C. § 744(d), outlines the conditions under which subsidized rail *freight* service shall be continued. Briefly, the subsidizer of rail freight service is required to designate, and enter into an agreement with, the operator of the service. The financial terms under which the service must be provided are established by RSPO. The ICC, however, retains the authority under limited, prescribed circumstances to relieve the designated railroad of its obligation to enter into an operating agreement.

6. During the transitional 180-day period when Conrail was required to maintain commuter services, Conrail received direct payment from the federal government for losses not otherwise reimbursed in accordance with a pre-existing subsidy commitment of a state, local or regional transportation authority (45 U. S. C. § 744(e)(5)(A)). After the mandatory 180-day operating period, Conrail was required to maintain commuter services only in the event of appropriate subsidy offers (text, *infra*, p. 11). Accordingly, under the Congressional scheme, the financial burdens of rail commuter service were and are imposed *exclusively* on the state and federal governments, but in no event on Conrail.

7. This Court has once reviewed the procedures through which USRA was to "designate" in the FSP the rail properties to be acquired and operated by Conrail, and the expedited mechanism pursuant to which the Special Court was to order the conveyance of those designated properties. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 108-117, 137-147 (1974).

8. Section 304(e)(2) of the Rail Act, 45 U. S. C. § 744(e)(2) provides that Conrail may discontinue rail commuter passenger service if

> . . . the Corporation [Conrail] . . . may (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the final system plan, abandon such properties pursuant to subsections (a) and (b) of this section.

If a state, local or regional transportation authority offers a rail service continuation payment for operations *after* the 180-day mandatory operating period, Conrail is required to maintain the service "except as otherwise provided in this subsection," *e.g.*, if a subsidy is not paid or an alternative operator is selected by the authority (45 U. S. C. § 744(e)(4)). Finally, Section 304(g) of the Rail Act, 45 U. S. C. § 744(g), provides that after the FSP rail system conveyed to Conrail has been operated for two years, the ICC may authorize Conrail to abandon rail property over which the service was provided if continued service is not required "by the public convenience and necessity", if Conrail demonstrates that the requisite subsidy has not been offered.[9]

8. (Cont'd.)

(A) . . . [the pre-conveyance level of] financial assistance is not provided;

(B) a State (or local or regional transportation authority) has not, by the end of such 180-day mandatory operation period, offered a rail service continuation payment pursuant to subsection (c)(2)(A) of this section;

(C) an applicable rail service continuation payment pursuant to such subsection (c)(2)(A) is not paid when it is due; or

(D) a payment required under a lease or agreement, pursuant to section 303(b)(2) of this title or subsection (c)(2)(B) of this section, is not paid when it is due.

9. Section 304(g) effectively divested the ICC of jurisdiction over *abandonment* applications by Conrail for properties conveyed to and thus owned by Conrail for the two-year period immediately following the April 1, 1976 conveyance. That section does not, however, affect Conrail's *discontinuance* rights which are at issue here. *See generally Brown v. Consolidated Rail Corporation*, 422 F. Supp. 1251 (N. D. Ohio 1976).

C. The Reform Act Authorizes Conrail, After the 180-Day Mandatory Operating Period, Summarily to Discontinue Commuter Rail Service Whenever State or Local Transportation Officials Discontinue the Requisite Subsidy.

A textual analysis of the Rail Act leads to a single conclusion—after the initial 180 days expire, appropriate subsidization is a *sine qua non* of Conrail's obligation to maintain rail commuter service. *See* Section 304(e)(2)(A)-(D) (*supra*, pp. 9-10, n. 8); RSPO Standards for Determining Commuter Rail Service Continuation Subsidies, 49 C. F. R. § 1127, *et seq.* *See also* I FSP 44-45 (Conrail ". . . would be available to operate commuter service, *providing suitable compensation is offered*") (emphasis added).[10] Thus, Sections 304(a) and 304(b) create summary discontinuance and abandonment rights which, as relevant here, are limited only by subsection (e)'s requirement of continued service during the 180-day mandatory operating period and by subsection (c)'s requirement of continued rail service during a period in which an appropriate subsidy is offered. The former limitation was designed to prevent the immediate discontinuance of rail passenger services after April 1, 1976, thus affording the responsible state and local agencies a sufficient opportunity after conveyance to determine whether the commuter service should be continued. The latter limitation, of course, underscores the explicit link between a subsidy offer and Conrail's obligation to continue rail passenger service.

10. It is not disputed either that the requisite operating subsidy for the Valparaiso-Chicago rail passenger service was discontinued or that Conrail complied with the "notice" requirements of the summary discontinuance provisions (45 U. S. C. § 744(a)). Accordingly, the only issue is whether the Rail Act prohibits the summary discontinuance of unsubsidized commuter services operated by Conrail over conveyed rail lines.

Further illumination of Congress' purpose to authorize summary discontinuance of commuter service upon the expiration of a subsidy is found in the House Report which accompanied H. R. 10979 (the predecessor of Section 804 of the Reform Act) which states:

> If, at the conclusion of the initial six months of operation by Conrail, a State or local transportation authority has not offered assistance for the continuance of service, Conrail or whoever is providing the service will be allowed to discontinue it. *In addition, such service can be discontinued whenever the needed financial assistance is ended or withdrawn.* H. Rep. No. 725, 94th Cong., 1st Sess. 95 (1975) (emphasis added).

Similarly, the Senate Report states that "[i]f a rail passenger subsidy . . . is offered at the end of the 180-day period, Conrail must continue to provide service *as long as payments are made when due.*" S. Rep. No. 499, 94th Cong. 1st. Sess. 111, *reprinted in* [1976] U. S. Code Cong. & Ad. News 127 (emphasis added). The link between appropriate financial assistance and Conrail's discontinuance rights could not be more clear.[11]

If the requisite financial assistance for commuter passenger service is thus not provided, Conrail is permitted by Section 304(e)(2) to ". . . (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the first system plan, abandon

11. The Seventh Circuit's contention that "nothing in the legislative history of the 4-R Act . . . support[s] Conrail's reading of the statute", 589 F. 2d at 1331 (A23), obviously disregards the several expressions of legislative purpose considered here. Moreover, contrary to the conclusion reached by the court below, the "motivation" of the Reform Act was to require the continuation of designated rail passenger service, not "in general terms", but only in the event an appropriate subsidy were offered.

such properties *pursuant to subsections (a) and (b).*" The italicized language plainly incorporates the summary discontinuance procedures of subsection (a) without regard to whether the rail lines over which commuter service is operated are also used by Conrail to provide rail freight service. By the same token, and not at issue here, the summary abandonment procedures of subsection (b) would permit the subsequent summary abandonment by Conrail of rail lines once used to provide then discontinued commuter service *only if* those rail lines had not otherwise been designated in the FSP for conveyance to Conrail for use in its freight operations. If, however, those rail lines *had* been so designated and conveyed, then no abandonment would be permitted without following the procedures of Section 304(g) of the Rail Act, 45 U. S. C. § 744(g). Simply stated, the FSP exclusion in Section 304(e)(2) applies only to abandonment, and the reference to subsections (a) and (b) modifies both subparagraphs (i) and (ii).[12]

12. In concluding that the reference to Sections 304(a) and 304(b) modifies only the last antecedent clause of the statute—*i.e.*, subparagraph (ii)—the Seventh Circuit invoked a "rule" of statutory construction that qualifying phrases ordinarily apply only "to the words or phrase immediately preceding and [not] . . . to others more remote." *United States v. Pritchett*, 470 F. 2d 455, 459 (D. C. Cir. 1972). Rules of statutory construction, however, are mere "aids" to construction; they do not have the force of law and will not be invoked to frustrate the obvious intent of the legislature. *Neuberger v. Commissioner*, 311 U. S. 83, 88 (1940); *SEC v. Joiner Corp.*, 320 U. S. 344, 350-351 (1943).

In any event, a contrary rule of statutory construction provides that a qualifying phrase which follows a series of words in a statute will be deemed to modify the more remote, as well as the more immediate, antecedents unless an unambiguous expression of legislative intent dictates otherwise. *See, e.g., Board of Trustees of Santa Maria Joint U. High School Dist. v. Judge*, 50 Cal. App. 3d 920, 123 Cal. Rptr. 830, 834 (1975) (after citing the "rule" of the "last antecedent," the court observed that "a contrary rule of construction is that when a clause follows several words in a statute and is applicable as much to the first words as to the others in the list, the clause should be applied to all of the words which preceded it"); G. J. Sutherland, *Statutory Construction* § 47.33, at 159 (4th

Nothing in the Rail Act, however, explicitly or implicitly requires ICC approval of the discontinuance of commuter service or otherwise limits Conrail's summary discontinuance rights dependent upon the ownership of the property used to provide the service. Moreover, when Congress intended to require approval of the ICC, it did so unambiguously. Thus, as just noted, Section 304(g) provides that in the event some portion of the rail system conveyed to Conrail under the FSP has been in operation for two years and is not thereafter appropriately subsidized, the *ICC* may authorize Conrail to *abandon* rail *property* over which rail service is not required by the "public convenience and necessity".[13] *See Addison v. Holly Hill Fruit Products Co.*, 322 U. S. 607, 614 (1944) ("Where Congress wanted to make exemption depend on size, as it did in two or three instances not here relevant, it did so by appropriate language.").

In sharp contrast, the statutory provisions governing *discontinuance* of rail *service* omit a reference either to the

12. (Cont'd.)
ed. 1972). *See also Singer v. United States*, 323 U. S. 338, 341 (1945), in which a "conspiracy" clause following a list of seven substantive offenses under section 11 of the Selective Training and Service Act of 1940 was deemed to modify the series of offenses, rather than merely the last offense.

13. In the Seventh Circuit's view, Section 304(g) "prescribes normal ICC regulatory procedures with respect to the *abandonment* of rail *service* under the FSP. The subsection does not appear to discuss *discontinuance* of service on FSP lines", 589 F. 2d at 1333 (A24) (emphasis in original). Contrary to the view of the Seventh Circuit, Section 304(g) prescribes ICC regulatory procedures for the abandonment of rail *property*, not rail *service*. As a consequence of its confusion between the "summary discontinuance of passenger service" and the "abandonment of rail properties," the lower court mistakenly relied on language from a Senate Report (S. Rep. No. 595 (Conference Report), 94th Cong., 2d Sess. 222, *reprinted in* [1976] U. S. Code Cong. & Ad. News 237-38) to support a conclusion that "Congress did not intend, in the 4-R Act, to allow summary discontinuance of FSP passenger service", 589 F. 2d at 1333 (A24).

ICC or to "public convenience and necessity."[14] Under well-settled principles of statutory construction, the explicit requirement of ICC approval of a proposed abandonment of a part of the FSP rail system, coupled with the omission of a reference thereto in the discontinuance provisions, compels the inference that Conrail is authorized summarily to discontinue FSP commuter rail service if appropriate subsidy arrangements are not implemented and continued. *See, e.g., Botany Worsted Mills v. United States*, 278 U. S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"); *Feldman v. Philadelphia National Bank*, 408 F. Supp. 24, 34 (E. D. Pa. 1976) ("In comprehensive enactments all omissions should be taken as exclusions, and this is especially so where other sections include the thing omitted").

If the requisite operating subsidy expires subsequent to the end of the 180-day mandatory operating period, Conrail's discontinuance rights are governed by Section 304(e)(4) under which the obligation to maintain rail passenger service is similarly linked to an offer of financial assistance. *Absent* an appropriate subsidy offer, Conrail is not required to continue service in the post-180-day period. "If a State (or a local or regional transportation authority) . . . offers a rail service continuation payment . . . for the operation of rail passenger service after the 180-day mandatory operation period, . . . [Conrail] shall continue

14. Section 304(a)(2) does require ICC approval, under prescribed standards and conditions, of a discontinuance of rail service on rail properties which are not required to be operated under the FSP "as a consequence of a recommended arrangement for joint use or operation of rail properties . . . or as part of a coordination project. . . ." The specific requirement of ICC approval of discontinuance under Section 304(a)(2) reinforces the conclusion that a similar requirement was not imposed by Congress for non-Section 304(a)(2) discontinuances.

to provide such service after the end of such period, *except as otherwise provided in this subsection*" (emphasis added).

The italicized language plainly mandates that, in the absence of financial assistance under Section 304(e), the summary procedures of Section 304(a) apply to the discontinuance of all commuter service.[15] Moreover, if Congress intended that Section 304(e)(4) should apply only in limited circumstances, it could have so provided by appropriately restrictive language. Congress' failure to limit its scope comports with its underlying purpose to allow Conrail, after the initial 180 days following conveyance, to discontinue unsubsidized rail commuter passenger service.

D. Summary Discontinuance of FSP Commuter Service Effectuates the Purpose of the Congressional Railroad Reorganization Scheme.

As noted in the Introduction, a fundamental purpose of the Rail Act is to promote the railroads' competitive position by increasing their flexibility in responding to market conditions. Additionally, in structuring Conrail as

15. Before the lower courts, the State of Illinois claimed that the phrase "except as otherwise provided in this subsection" applies only to Section 304(e)(6), which relieves Conrail of an obligation to provide "duplicative" rail passenger service. The Seventh Circuit at least tacitly accepted Illinois' construction even while acknowledging that (e)(6) "otherwise has no bearing on this appeal", 589 F. 2d at 1331 (A20). Nothing in the statute or its legislative history supports the lower court's interpretation of the *proviso*. Indeed, a *proviso* will be applied in accordance with the legislative intent, which may limit its effect to the section in which it is located, or the preceding or subsequent sections. Alternatively, the legislative intent may suggest that the *proviso* applies generally to cases "within the meaning of the language used." *McDonald v. United States*, 279 U. S. 12, 21 (1929) ("[A] proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used"). *See generally* G. J. Sutherland, *Statutory Construction*, *supra*, § 47.09, at 84. Only rarely will the effect of a *proviso* be restricted to *subsequent* sections unless the context so dictates.

a "freight only" common carrier, with limited and defined statutory obligations to operate passenger service, Congress intended to relieve Conrail of the burden of mandatory operation of unprofitable passenger service and to avoid the cross-subsidization of passenger and freight service that contributed to the bankruptcy of the railroads in reorganization.[16]

Finally, the Rail Act reflects a Congressional attempt to delegate to *state and local* transportation agencies the authority to determine the levels—and modes—of commuter services that should be provided. A determination by responsible local officials to discontinue a subsidy for commuter rail service—even if designated "essential" by USRA and noted in the FSP—allows Conrail, without more, to discontinue the unsubsidized service.[17] Under the comprehensive scheme of the Rail Act, the ICC is not entitled to review either the "local" determination to discontinue a

16. In addition to the specific provisions of Section 304, the more general provisions of the Rail Act and the Reform Act also evidence this unambiguous Congressional intent. *See, e.g.*, 45 U. S. C. § 701(b)(5) ("assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation . . ."); 49 U. S. C. § 10362(b)(5) (". . . standards for the computation of subsidies for rail passenger service . . . which are consistent with the compensation principles described in the final system plan and which avoid cross subsidization among commuter, intercity, and freight rail services . . .").

17. As Robert E. Patricelli, Administrator of the Urban Mass Transportation Authority, explained:

> States and localities should consider their support to commuter rail based on their examination of what type of transit service —be it bus, or rapid-rail or commuter rail or anything else— makes the most sense in a particular location. . . . Local responsible officials must be able to determine what levels of service should be provided, over what routes and at what fares, without the additional burden of Federal economic regulation through the I. C. C. *Proposed amendments to the Urban Mass Transportation Act of 1964: Hearings on H. R. 10631 and H. R. 10632 before the Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.*, 94th Cong., 1st Sess. 26, 28 (1975).

subsidy or Conrail's determination to discontinue unsubsidized passenger service.[18]

Nonetheless, the Seventh Circuit, relying primarily on Congress' failure in 1976 to delete Section 304(a)'s FSP exclusion, would require Conrail to obtain ICC or state regulatory approval of the discontinuance of unsubsidized FSP rail commuter services. It is well-established that while the statutory language constitutes the principal source of insight into legislative purpose,[19] courts must not be guided by "a single sentence or member of a sentence but look to the provisions of the whole law, and to its object and policy" *United States v. Heirs of Boisderé*, 49 U. S. (8 How.) 113, 122 (1850), quoted with approval in *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270, 285 (1956). *See also Richards v. United States*, 369 U. S. 1, 11 (1962).

Contrary to the holding of the court below, Sections 304(a) and 304(e) are harmonized by a construction which recognizes the fundamental purpose of Section 304 —*i.e.*, to relieve Conrail of the obligation to operate un-

18. As noted above, RSPO, not the ICC, has the authority to regulate commuter service provided by Conrail after April 1, 1976. And the RSPO, which established principles and procedures governing the continuance of rail commuter service, 49 C. F. R. § 1127, *et seq.*, has concluded that Conrail's summary discontinuance of the Valparaiso commuter service was authorized under the Reform Act:

> Under the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Conrail was required to operate the Valparaiso commuter service, among others, for the first 180 days after Conrail's start-up date, which was April 1, 1976. Thereafter, continuation of the service was required only if Conrail was offered a subsidy to cover the losses incurred on the service. As required prior to discontinuing service, Conrail has posted notices of discontinuance for the Valparaiso service as of September 30, 1978 because no offer of subsidy has been made for service after that date. RSPO, *Analysis of Conrail's Commuter Service Between Valparaiso, Indiana and Chicago*, at 3 (August 24, 1978).

19. *Flora v. United States*, 357 U. S. 63, 65 (1958).

profitable rail commuter service. The mere reenactment in the Reform Act of Sections 304(a) and 304(b), which were designed only to outline the procedural framework for summary discontinuance and abandonment, does not override the recurrent expressions of legislative policy to allow summary discontinuance of unsubsidized commuter services. *See also Zuber v. Allen*, 396 U. S. 168, 194 n. 31 (1969) (Section 4 of the Agricultural Marketing Agreement Act of 1937, which "is typical of statutory boilerplate traditionally included in legislative re-enactments . . .", did not effectively ratify marketing agreements that had been approved by the Secretary of Agriculture under the 1935 predecessor statute); *Addison v. Holly Hill Fruit Products, supra*, 322 U. S. at 617 ("If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction.").

The Seventh Circuit's "reconciliation" of Sections 304(a) and 304(e) requires Conrail to perform a futile act, which Congress presumably did not contemplate. Thus, the court below evidently conceded the "substantive" proposition that local subsidization is a prerequisite of continued passenger service:

> The district court put considerable emphasis on the fact that, under its reading of the entire legislative scheme under the 3-R and 4-R Acts, local subsidization is the *sine qua non* of continued passenger service. *This reading may well be correct as a matter of substantive law.* (589 F. 2d at 1332 (A21)) (emphasis added).

The court, however, suggested that, regardless of the accuracy of the district court's interpretation of the Rail Act and the Reform Act, the underlying issue is solely the

appropriate *procedure* for discontinuing FSP passenger service. "[E]ven if Conrail is right in asserting that the absence of a subsidy makes it absolutely entitled to discontinue the service, this would leave unanswered the question as to which procedure must be used in achieving that goal." 589 F. 2d at 1332 (A22). Of course, if Conrail is "absolutely" entitled to discontinue the service, then ICC or state intervention serves only a purpose of delay.[20] Certainly, Congress could not have intended to require Conrail to engage in the futile exercise of obtaining the ICC's "rubber-stamp" of rail passenger service discontinuance.

In support of its interpretation of Section 304, the Seventh Circuit observed that the FSP, which Congress generally approved in the Reform Act, 45 U. S. C. § 718 (d)(1), required approval of discontinuances of rail passenger service by the "proper regulatory authorities"—a requirement similarly reflected by the ICC's "Evaluation of the U. S. Railway Association's Final System Plan" (August 23, 1975). However, both the FSP and the ICC's "Evaluation" were prepared *prior* to the enactment of the Reform Act; accordingly, the references relied on by the Seventh Circuit scarcely provide insight into the legislative purpose of the subsequent enactment.

Nonetheless, the court below, while disclaiming that "undue weight" was accorded the foregoing references in the FSP and the ICC's "Evaluation," maintained that Congress' approval of the FSP "does tend to undercut Conrail's position" 589 F. 2d at 1333-34 (A26-27). Congressional "approval" of the FSP neither enacted the FSP into law nor evidenced a reaffirmation of every provision of a lengthy and complicated document which was completed only months before enactment of the Reform Act. *See Zuber v. Allen, supra,* 396 U. S. at 193 ("[T]he 1937 re-enactment of the 1935 amendments was routine and did not follow a comprehensive review of the issues that had been explored in detail by the 1935 draftsmen . . ."); *United States v. Calamaro,* 354 U. S. 351, 359 (1957) (the re-enactment, without modification, of a federal revenue statute does not reflect Congressional approval of an administrative regulation interpreting the statute where the regulation "had been in effect for only three years [footnote omitted], and there is nothing to indicate that it was ever called to the attention of Congress"). In any event, the more detailed statement of legislative purpose in Section 304(e) supersedes an assertedly inconsistent provision of the FSP, incorporated merely by reference in the Reform Act.[21]

20. Alternatively, however, the court below stated that an ICC hearing will serve to "clarify" the extent of the operating deficit. 589 F.2d at 1332 (A22). The short answer to this contention is that the *existence* of a deficit, not its extent, triggers the right to discontinue the service. As the relevant state agencies had extended a subsidy offer for the Valparaiso-Chicago service for two and one-half years, the existence of a deficit on the Valparaiso-Chicago run was not significantly disputed.

21. Indeed, Section 304(b)(3) of the Rail Act, 45 U. S. C. § 744(b)(3), explicitly authorizes the summary discontinuance of rail service under Section 304(a) "notwithstanding any provision of the Interstate Commerce Act, the constitution or law of any State or the decision of any court or administrative agency of the United States or of any State."

CONCLUSION.

On the basis of the foregoing, the Petition for Certiorari should be granted, and a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 3768.

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

Memorandum Opinion.

(Filed October 10, 1978)

Plaintiffs bring this action pursuant to 28 U. S. C. §§ 1331 and 1337 for preliminary and permanent injunctive relief, seeking to enjoin the effectiveness of the Notice of Discontinuance and the proposed discontinuance of four passenger trains operated daily by the defendant Consolidated Rail Corporation ("ConRail") between Valparaiso, Indiana and Chicago, Illinois. Pursuant to a hearing on September 29, 1978, this Court entered a temporary restraining order requiring ConRail to continue the passenger service, and granted plaintiffs' request to file a reply memorandum. Further hearing was held on October

6, 1978. At that time an order was entered vacating the temporary restraining order and dismissing the complaint. That order was stayed until 7:00 p.m., Tuesday, October 10, 1978.

ConRail has operated the Valparaiso-Chicago commuter service, formerly run by the Penn Central, since April 1, 1976. Since September 27, 1976, ConRail has operated this service in accordance with various subsidy agreements. Successive subsidy arrangements have been made with the Northwestern Indiana Passenger Transportation Authority, with the Public Service Commission of Indiana, and finally with the Northwestern Indiana Regional Transportation Authority ("NIRTA"). NIRTA's agreement to subsidize the requisite local share of the Valparaiso-Chicago commuter service expired September 30, 1978. Since September 30, 1978, no state, local or regional transportation authority has stepped forward to offer continued subsidy payments for the period beginning October 1, 1978.

In anticipation of this lapsing of any subsidy from an appropriate authority, ConRail gave notice of its intended discontinuation of the Valparaiso-Chicago commuter service on August 1, 1978 pursuant to 45 U. S. C. §§ 744(a)(1) and 744(e). This notice was scheduled to go into effect immediately after September 30, 1978.

Plaintiffs do not question ConRail's compliance with the procedures set forth in § 744(a)(1). Rather, they challenge the applicability of these procedures to this Valparaiso-Chicago passenger service. Essentially, plaintiffs argue that since (1) the Final System Plan specifically stated that, if the Valparaiso-Chicago service was to be discontinued, it would be pursuant to approval by the "the proper regulatory authorities" and (2) the Final System Plan was specifically approved by the Congress at the same

time that § 744(e) was enacted, the specific Final System Plan requirement of submitting discontinuance to regulatory approval should control. We disagree. A study of the sequence of the relevant legislation shows that § 744(e) overruled the prior, inconsistent language in the Final System Plan.

On January 2, 1974, the Regional Rail Reorganization Act of 1973 ("3-R Act"), Publ. L. No. 93-236, 87 Stat. 985 (1974), was enacted. This 3-R Act constituted the initial legislative effort to reorganize the financially depressed railroads of the nation's northeast region. Section 304 of the 3-R Act (current version at 45 U. S. C. § 744) set forth a procedure, entirely apart from any regulatory procedure, for the summary discontinuance of certain rail services. Subject to the limitations provision of § 304(c), § 304(a) provided that rail service could be discontinued if (A) the final system plan did not designate rail service to be operated over such rail properties, (B) 60 days notice was given not sooner than 30 days following the effective date of the system plan, and (C) the notice was given to certain specified persons. Section 304(c) further stated that

> Rail service may be discontinued and rail properties may be abandoned under subsections (a) and (b) of this section notwithstanding any provision of the Interstate Commerce Act (49 U. S. C. 1 et seq.) or the constitution or law of any State or the decision of any court or administrative agency of the United States or of any State.

Thus, as originally enacted in 1974, § 304 distinguished between service on final system plan lines and non-final system plan lines in the availability of the special discontinuance provisions in § 304(a). Original § 304 drew no distinctions between passenger and non-passenger rail

service but excluded services designated in the final system plan from the special discontinuance provisions.

Pursuant to § 208 of the 3-R Act (current version at 45 U. S. C. § 718), the United States Railway Association ("USRA") completed and offered the Final System Plan on July 26, 1975. In this Final System Plan, the USRA selected the essential rail properties previously operated by the railroads in reorganization and designated these properties for conveyance to ConRail. The line between Valparaiso and Chicago here in question was designated by the Final System Plan as one for continued operation. Thus, as per the original formulation of § 304, the summary discontinuation provisions with respect to non-final system plan lines would have been inapplicable:

> These services will be continued on the day of conveyance. USRA recommends that ConRail seek a satisfactory subsidy arrangement for provision of these services. If such agreements have not been ecuted by time of conveyance, USRA recommends that ConRail post these services for discontinuance. Approval for such discontinuances must be obtained from the proper regulatory authorities.
>
> * * *

PC service between Chicago and Valparaiso, Ind. United States Railroad Association, I *Final System Plan* 46 (1975). The Interstate Commerce Commission reached the same conclusion in its August 25, 1975 evaluative report, stating that any proposed discontinuance of commuter service over Final System Plan lines "would require approval by the proper regulatory agencies in the normal manner." Interstate Commerce Commission, *Evaluation of the U. S. Railway Association's Final System Plan*, 20

(1975). This meant that, if no subsidy arrangements were agreed to, ConRail would have to file for approval to discontinue the service, and the ICC would have to rule within four months or the application would be deemed approved.

Subsequent to these documents, however, Congress substantially redrafted the provisions of § 304 with respect to the termination of passenger service. Section 804, 45 U. S. C. § 744, of the Railroad Revitalization and Regulatory Reform Act of 1976, ("4-R Act"), Pub. L. No. 94-210, 90 Stat. 31 (1976), which became law on February 5, 1976, while it retained the provisions of § 304(a)-(c) of the 3-R Act, *see* 34 [*sic*] U. S. C. § 744(a)(1), (b) and (c), added several new subsections. Section 804(e) of the 4-R Act, 45 U. S. C. § 744(e), specifically deals with *all* rail passenger service, not merely rail passenger service over *non*-final system plan lines. Section 744(e)(1) provides that ConRail was required to continue to provide rail passenger service for 180 days following the date of conveyance, April 1, 1976,

> whether or not such properties are designated in the final system plan as rail properties over which rail service is required to be operated. . . .

Similarly, § 744(e)(2), which sets forth the requirements of securing or continuing financial assistance for the passenger service, states that if the requisite conditions are not satisfied,

> the Corporation [ConRail] . . . may (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the final system plan, abandon such properties pursuant to subsections (a) and (b) of this section.

The phrasing of (i) and (ii) in the passage above clearly indicates that this statute contemplated the *discontinuation* of passenger service over final system plan lines in accordance with the § 744(a)(1) procedures, *see Coleman v. Consolidated Rail Corp.*, 449 F. Supp. 621 (N. D. Ohio 1977) (summary discontinuance of Youngstown-Cleveland passenger service, designated in the Final System Plan, upheld), while the *abandonment* of final system plan lines would not be similarly governed. This distinction is consistent with Congress' legislative effort to continue freight service over final system plan lines, while requiring passenger service to be self-supporting with the assistance of requisite subsidy payments.

Given this unambiguous statutory language, it is clear that Congress, with respect to passenger rail service, altered the distinction made in § 304(a) of the 3-R Act between final system plan and non-final system plan lines. This specific statutory directive takes precedence over the inconsistent language in the *earlier* written Final System Plan notwithstanding the fact that Congress "approved" the Final System Plan in the 4-R Act. *See* 4-R § 601(e), 45 U. S. C. § 718(d)(1). Such general approval cannot be construed to override or condition the specific statutory framework of § 744(e). *See, e.g., Monte Vista Lodge v. Guardian Life Ins. Co. of America*, 384 F. 2d 126, 219 (9th Cir. 1967).

Plaintiffs resist this conclusion, arguing that the legislative history of the subsection (e) amendment to § 304 of the 3-R Act shows that it was intended to deal exclusively with problems regarding passenger service over *non*-final system plan lines. There is support for plaintiffs' suggestion that the motivation for subsection (e) was to provide for continuation of passenger rail service on certain *non*-final system plan lines. *See* S. Rep. No. 94-499, 94th Cong., 2nd Sess. 43, *reprinted in* (1976) U. S. Code Cong. & Ad. News 14, 57; Sen. Conf. Rep. No. 94-595, 94th Cong., 2nd Sess. 143, *reprinted in* (1976) U. S. Code Cong. & Ad. News 148, 158. *See also*, I Final System Plan, *supra*, at 45-46. However, this legislative history is not inconsistent with the actual language of subsection (e), since this new subsection did address the problem of summary termination of non-final system plan passenger service. That § 744(e) does more by requiring passenger service over both final system plan and non-final system plan lines to be treated identically is not inconsistent with this legislative history. Such inconclusive legislative history cannot be held to overrule the clear language of the statute. *See, e.g., Ex Parte Collett*, 337 U. S. 55, 61 (1948).

We find that the provisions enacted in § 804(e), 45 U. S. C. § 744(e), of the 4-R Act control this case. Section 744(e)(2) sets forth the conditions under which summary discontinuance of passenger rail service could be secured after the initial 180 day mandatory service period. The statute provides, in pertinent part,

> If—
>
> (A) such financial assistance is not provided;
>
> (B) a State (or a local or regional) transportation authority has not, by the end of such 180 day mandatory operation period, offered a rail service continuation payment pursuant to subsection (c)(2)(A) of this section;
>
> * * *
>
> the Corporation . . . may (i) discontinue such rail passenger service . . . pursuant to subsections (a) . . . of this section.

Section 744(e)(4) further provides for the continuation of passenger service *after* the initial mandatory 180 day period. That provides, in pertinent part:

> If a State (or a local or regional transportation authority)—
>
> (A) offers a rail service continuation payment . . . for the operation of rail passenger service *after* the 180-day mandatory operation period, and
>
> • • •
>
> the Corporation . . . shall continue to provide such service after the end of such period, *except as otherwise provided in this subsection.* [Emphasis added.]

Unlike the situation in *Coleman v. Consolidated Rail Corp.*, 449 F. Supp. 621 (N. D. Ohio 1977), where the summary discontinuance of rail passenger service between Youngstown and Cleveland was held proper under the precise scope of § 744(e)(2) as to the end of the initial mandatory 180 day period, the Valparaiso-Chicago passenger service has been continued for two years after the initial 180 day period. However, reading § 744(e)(4) in conjunction with § 744(e)(2), we do not believe that this continued subsidized ConRail operation of the Valparaiso-Chicago service negates the availability of the summary discontinuance procedures. The language in § 744(e)(4) that service must be continued by the Corporation *after* the 180 day period "except as otherwise provided in this subsection" can have no other meaning than to render the conditions of financial assistance established in § 744(e)(2) operative in the post-180 day period and to render the summary procedures of § 744(a)(1) available.

Plaintiffs' theory, espoused at the hearing on October 6, that, even assuming the provisions of § 744(e)(1) and (2) were applicable to the Valparaiso-Chicago passenger service, the § 744(a)(1) discontinuance provisions should not be construed to be applicable after the initial 180 day

period had expired is untenable. Plaintiffs' theory is that the summary procedures should be construed to have been available only during the initial stages of ConRail's setting up operations, and that, if an initial subsidy agreement was made, discontinuances in subsequent periods should be subject to normal regulatory procedures. This theory, apparently founded upon some vague notion of "fairness", has no foundation in either the statute or the legislative history: it does not explain the meaning of § 744(e)(4)'s "except as otherwise provided" language. Moreover, we believe that Congress' apparent effort in § 744(e)(2) and (4) to make continued local, regional or state subsidization of ConRail passenger service a *sine qua non* for service after the initial 180 day period, regardless of final system plan or non-final system plan designation, is consistent with a uniform procedure for discontinuance of unsubsidized services. It seems clear to us that Congress intended a continuing subsidy to be a condition of continuing service.

Plaintiffs also suggested at the hearing on October 6 that support for their construction of the statute could be derived from the interrelationship of § 808 and § 804 of the 4-R Act of 1976. Section 808, 49 U. S. C. § 1613, *as amended by* Pub. L. No. 95-187, 91 Stat. 1385 (1977), amended the Urban Mass Transportation Act of 1964, *see* 49 U. S. C. §§ 1601 *et seq.*, by providing for substantial federal assistance in financing the subsidies required under § 744(e) to continue passenger rail service. Nothing in § 808 indicates a Congressional purpose to restrict the § 744(a)(1) discontinuance procedures in the event that no subsidy agreement was reached.

Finally, plaintiffs have stated that they are unable to stipulate to the fact that the Valparaiso-Chicago passenger service is operating at a loss and suggest that ConRail downgraded service on the line, discouraging passengers and thereby causing whatever losses have actually been

suffered. On the record before us, we question whether plaintiffs can seriously doubt the deficit operation of the Valparaiso-Chicago passenger service, particularly since three different authorities have endeavored at one time or another to provide for subsidy assistance. Plaintiffs did not raise this argument in the hearing on October 6. Nor have plaintiffs given any information supporting their conclusory assertion that ConRail, itself, has provoked the deficit by discouraging ridership. Given the vague and unsupported nature of these claims, we do not find in them any reason to grant the preliminary and permanent injunctive relief which plaintiffs seek.

In sum, we hold that ConRail was entitled to use the notice procedures of § 744(a)(1) by virtue of the direct statutory mandate in § 744(e)(2) and (4). No question has been raised with respect to ConRail's compliance with the § 744(a)(1) procedures. More importantly, since August 1, 1978, no transportation authority has offered to make the continued subsidy payments required under § 744(e). Accordingly, ConRail may discontinue the service.

/s/ HUBERT L. WILL

United States District Judge

DATED: October 10, 1978

PEOPLE of the STATE OF ILLINOIS et al.,
Plaintiffs-Appellants,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

No. 78-2292.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT.

Argued Dec. 11, 1978.

Decided Dec. 29, 1978.

Rehearing and Rehearing En Banc
Denied Jan. 25, 1979.

Before FAIRCHILD, Chief Judge, and PELL and BAUER, Circuit Judges.

Opinion.

PELL, Circuit Judge.

The question presented by this appeal is, in large part, procedural. The defendant, Consolidated Rail Corporation (ConRail) is attempting to discontinue its rail passenger service between Chicago, Illinois, and Valparaiso, Indiana. The plaintiffs are attempting to prevent its doing so. The specific issue involved is whether ConRail is entitled to discontinue this particular passenger service simply by posting notice of the discontinuance for 60 days,

and by notifying certain parties of the discontinuance, under the provisions of 45 U. S. C. § 744(a)(1), or whether ConRail is required to apply to the Interstate Commerce Commission (ICC) under 49 U. S. C. § 13a(1) (or to the appropriate state regulatory agencies).

The facts involved in this lawsuit are not complex and, for the most part, undisputed. ConRail operates four daily passenger trains between Valparaiso and Chicago. Approximately 500 commuters use this service in each direction daily. "Analysis of ConRail's Commuter Service Between Valparaiso, Indiana and Chicago" (Rail Services Planning Office, Interstate Commerce Commission, August 24, 1978). These trains were formerly operated by the Penn Central Railroad. ConRail has operated these trains in accordance with various subsidy agreements since September 27, 1976. The most recent subsidy agreement was made with the Northwestern Indiana Regional Transportation Authority (NIRTA). NIRTA's subsidy agreement expired on September 30, 1978, and since that time neither NIRTA nor any other body has offered subsidy assistance to ConRail.

On August 1, 1978, in anticipation of the lapsing of the subsidy arrangement, ConRail gave notice that it intended to discontinue the service effective October 1, 1978. This discontinuance notice was purportedly given pursuant to the requirements of 45 U. S. C. §§ 744(a)(1) and 744(e). This form of discontinuance notice will be referred to as "summary discontinuance." The plaintiffs do not dispute that the notice given was adequate under the provisions of these sections. Rather, their contention is that the *summary* discontinuance provisions have no application to the discontinuance of these particular trains. Their position is that ConRail was required to obtain approval to discontinue from the Interstate Commerce Commission, under the provisions of 49 U. S. C. § 13a(1), or from the appropriate state regulatory agencies.

The plaintiffs brought this suit in the district court pursuant to 28 U. S. C. §§ 1331 and 1337 for preliminary and permanent injunctive relief against the proposed summary discontinuance. The district court held a hearing on September 29, 1978, and entered a temporary restraining order prohibiting the discontinuance of the trains. A second hearing was held on October 6, 1978. At that time, the district court vacated the temporary restraining order and dismissed the plaintiffs' complaint. The order was stayed until 7:00 p.m., Tuesday, October 10, 1978, to give the plaintiffs a chance to seek a further stay from this court.

On October 10, 1978, the plaintiffs applied for, and received, a stay of the district court order pending further order of this court. The stay of the district court order is still in effect, and ConRail is still operating the trains in question.

I.

Prior to the enactment of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986 (January 2, 1974) (the "3-R Act"), railroads seeking to discontinue service over an interstate line would have been required to seek the approval of one of the two regulatory agencies.

The 3-R Act was enacted in response to a major rail crisis which was precipitated when a number of railroads in the northeast and midwest entered reorganization proceedings. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 108, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974). Section 301 of the 3-R Act, 45 U. S. C. § 741, authorized the establishment of ConRail as a private for-profit corporation to which various railroad properties would be conveyed.

In addition, § 304(a) of the 3-R Act authorized a summary discontinuance procedure, to be available in limited cases, which would permit ConRail to discontinue service by posting a notice of discontinuance for 60 days, and by notifying certain designated parties. 45 U. S. C. § 744(a). Under this procedure, approval of the ICC or state agencies was not required. Section 304(a) of the 3-R Act, 45 U. S. C. § 744(a) provided:

> TERMINATION OF RAIL SERVICE.
>
> Sec. 304. (a) Discontinuance.—Except as provided in subsections (c) and (f) of this section, (1) rail service on rail properties of a railroad in reorganization in the region which transfers to the Corporation or to profitable railroads operating in the region all or substantially all of its rail properties designated for such conveyance in the final system plan, and (2) rail service on rail properties of a profitable railroad operating in the region which transfers substantially all of its rail properties to the Corporation or to other railroads pursuant to the final system plan may be discontinued to the extent such discontinuance is not precluded by the terms of the leases and agreements referred to in section 303(b)(2) of this title if—
>
> (A) the final system plan does not designate rail service to be operated over such rail properties; and
>
> (B) not sooner than 30 days following the effective date of the final system plan, the trustee or trustees of the applicable railroad in reorganization or a profitable railroad give notice in writing of intent to discontinue such rail service on a date certain which is not less than 60 days after the date of such notice; and

> (C) the notice required by paragraph (B) of this subsection is sent by certified mail to the Governor and State transportation agencies of each State and to the government of each political subdivision of each State in which such rail properties are located and to each shipper who has used such rail service during the previous 12 months.

It is undisputed that § 304(a) is not directly applicable to the Valparaiso-Chicago line involved in this case. The reason is that § 304(a) expressly excludes from its scope rail properties which the final system plan designates to be operated. The Final System Plan (FSP) is a document which the United States Railway Association prepared, under the provisions of §§ 201 and 202 of the 3-R Act, 45 U. S. C. §§ 711 and 712. The Valparaiso-Chicago line is included in the FSP at 1 FSP 46. As a result, summary discontinuance under § 304(a) does not directly apply. Indeed, counsel for ConRail conceded at oral argument that prior to the later enactment of § 304(e) (discussed *infra*), ConRail would have had no alternative but to apply to the ICC for approval of the proposed discontinuance of passenger service over this FSP line.

II.

The FSP was submitted to Congress on July 26, 1975. The FSP was specifically approved in § 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94 210, 90 Stat. 31 (February 5, 1976) (the "4-R Act"). As codified, this approval appears at 45 U. S. C. § 718(d)(1). The 4-R Act also had the effect of revising parts of the 3-R Act, and the effect of some of these revisions is at issue in this appeal.

The critical change made by the 4-R Act, for the purpose of this case, is the addition to the 3-R Act of 45

U. S. C. § 744(e). That subsection, in relevant part, reads as follows:

> (e) Rail passenger service.—(1) The Corporation (or a profitable railroad) shall provide rail passenger service for a period of 180 days immediately following the date of conveyance (pursuant to section 743(b)(1) of this title), with respect to any rail properties over which a railroad in reorganization in the region, or a person leased, operated, or controlled by such a railroad, was providing rail passenger service immediately prior to such date of conveyance. Such service shall be provided on such properties regardless of whether or not such properties are designated in the final system plan as rail properties over which rail service is required to be operated, except with respect to properties over which such service is provided by the National Railroad Passenger Corporation.
>
> (2) If a State (or local or regional transportation authority) was providing financial assistance to support the operation of rail passenger service, pursuant to a lease or agreement which was in effect immediately prior to the date of conveyance (pursuant to such section 743(b)(1) of this title, the Corporation (or a profitable railroad) shall be bound by the service provisions of such lease or agreement for the duration of the 180-day mandatory operation period specified in paragraph (1) of this subsection. If a State or such an authority was providing financial assistance for the continuation of rail passenger service on rail properties immediately prior to such date of conveyance, it shall provide the same level of financial assistance during such 180-day mandatory operation period. If no such financial assistance was being provided or if no such lease or agreement was in effect immediately prior to such date of conveyance with respect to any such rail properties, the Corporation (or a profitable railroad) shall provide the same level of rail passenger service, for the duration of such 180-day mandatory operation period, that was provided prior to such date by the applicable railroad. If—
>
> (A) such financial assistance is not provided;
>
> (B) a State (or a local or regional transportation authority) has not, by the end of such 180-day mandatory operation period, offered a rail service continuation payment pursuant to subsection (c)(2)(A) of this section;
>
> (C) an applicable rail service continuation payment pursuant to such subsection (c)(2)(A) of this section is not paid when it is due; or
>
> (D) a payment required under a lease or agreement, pursuant to section 743(b)(2) of this title or subsection (c)(2)(B) of this section, is not paid when it is due,
>
> the Corporation (or, where applicable, the National Railroad Passenger Corporation, a profitable railroad, or the trustee or trustees of a railroad in reorganization in the region) may (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the final system plan, abandon such properties pursuant to subsections (a) and (b) of this section.
>
> . . .
>
> (4) If a State (or a local or regional transportation authority)—
>
> (A) offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of the

section and under regulations issued by the Office pursuant to section 715(d)(5) of this title, for the operation of rail passenger service after the 180-day mandatory operation period, and

(B) provides compensation, pursuant to paragraph (2) of this subsection, for operations conducted during the 180-day mandatory operation period, the Corporation (or a profitable railroad) shall continue to provide such service after the end of such period, except as otherwise provided in this subsection.

. . .

(6) Notwithstanding any other provision of this subsection, the Corporation is not obligated to provide rail passenger service on rail properties if a State (or a local or regional transportation authority) contracts for such service to be provided on such properties by an operator other than the Corporation, except that the Corporation shall, where appropriate, provide such operator with access to such properties for such purpose.

The first important change under § 744(e) is the requirement that ConRail shall provide rail passenger service for 180 days following the date of conveyance (April 1, 1976), whether or not the lines are included in the FSP. Secondly, § 744(e)(2) provides that, on the happening of any of the events specified in (A) through (D), ConRail "may (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the final system plan, abandon such properties pursuant to subsections (a) and (b) of this section." The reference to subsections (a) and (b) is to § 744(a) and (b), which deal with summary discontinuance and summary abandonment, respectively.[1] The parties read this language in divergent ways. ConRail's reading, supported by the district court's opinion in this case, is that the language means that FSP passenger service may be summarily discontinued, but may not be summarily abandoned. In other words, the FSP exclusion is read as applying only to abandonment, and the reference to § 744(a) and (b) is read as modifying *both* the language contained in subparagraph (i) and subparagraph (ii).

The plaintiffs, by contrast, take the position that the reference to § 744(a) and (b) modifies only the last antecedent clause of the statute, and therefore applies only, under (ii), to abandonment, and not to discontinuance. Therefore, they argue, the language under (i) which permits discontinuance of the service is *not* made subject to the special summary procedures under § 744(a), so that ConRail must apply to a regulatory agency for discontinuance under the normal procedures.

There is a further complexity involved in reading this statute. The language discussed above applies, literally, only to discontinuance and abandonment at the end of the 180 day mandatory operation period. In this case, the service was not discontinued at the end of the 180 day period, because various subsidy offers were made resulting in the continuation of the service, the most recent of which was the NIRTA subsidy agreement which expired on September 30, 1978. In this case, then, ConRail must argue that the language which it reads as providing for summary discontinuance applies, although indirectly, by virtue of language in § 744(e)(4). That language provides that if a state or local authority offers a continuation payment for periods beyond the 180 day period, "the Corporation . . .

1. In this connection, it should be noted that summary discontinuance, under § 744(a) is *always* a prerequisite to summary abandonment under § 744(b).

shall continue to provide such service after the end of such period, except as otherwise provided in this subsection." ConRail reads the "except as otherwise provided" language as bringing into operation the discontinuance language under § 744(e)(2). The plaintiffs, by contrast, argue that the "except as otherwise provided" clause more likely refers to the provisions of § 744(e)(6), which otherwise has no bearing on this appeal.

As we noted earlier, § 304(a), as originally enacted in the 3-R Act specifically excluded FSP lines from the summary discontinuance procedures. Counsel for ConRail conceded at oral argument that, in light of this specific exclusion, ConRail must argue, in effect, that § 304(e), added in the 4-R Act, amends § 304(a) by eliminating the FSP exclusion. We note, however, that § 304(e) was added by § 804 of the 4-R Act, which begins: "Section 304 of the Regional Rail Reorganization Act of 1973 (45 U. S. C. 744) is amended to read as follows: . . ." All of § 304, as amended, is then set forth, *including* the original exclusion of FSP lines from the summary discontinuance procedures, in § 304(a). To say the least, this results in an ambiguity in the entire statute with respect to the question of whether summary discontinuance is appropriate under the circumstances of this case. ConRail, in effect, asks us to ignore the FSP exclusion in § 304(a), which was reenacted in the 4-R Act, and to hold that § 304(e) allows summary discontinuance of FSP passenger lines. This we refuse to do. It is a well-established principle of statutory construction that, whenever possible, statutes are to be construed so that no clause, sentence or word is rendered void or contradictory. *Rockbridge v. Lincoln*, 449 F. 2d 567, 571 (9th Cir. 1971). Before holding that Congress has amended § 304(a) by implication, there should be shown the clear intent of Congress to do so. *Freeman v. Chicago Title & Trust Co.*, 505 F. 2d 527, 533 (7th Cir. 1974). We find no clear evidence of this intent in this case. Given the possibility of conflict between the provisions of § 304(a) and (e), it is our duty to attempt to reconcile the two provisions, absent clearly expressed Congressional intent to the contrary. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 133, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974). Before holding that part of § 304(a) has been modified by the addition of § 304(e), it is reasonable to insist on the use of language which would show that Congress has made a considered determination to that end. *Id.*, 419 U. S. at 134, 95 S. Ct. 335.

There is nothing in the legislative history of the 4-R Act to support ConRail's reading of the statute. Rather, the legislative history shows, in general terms, that the motivation for the 4-R Act was to provide for the continuation of certain rail passenger lines, as the district court noted. On this basis, the district court stated that the inconclusive legislative history could not overrule the clear language of the statute, citing *Ex Parte Collett*, 337 U. S. 55, 61, 69 S. Ct. 944, 93 L. Ed. 1207 (1948). There can be no quarrel with this basic proposition, but we do not read the clear language of the statute as permitting summary discontinuance in this case. At best, the language of the statute is ambiguous.

The district court put considerable emphasis on the fact that, under its reading of the entire legislative scheme under the 3-R and 4-R Acts, local subsidization is the *sine qua non* of continued passenger service. This reading may well be correct, as a matter of substantive law.[2] In the

2. The parties are not in agreement as to this substantive question. It is apparent, from the plaintiffs' citation of *Southern Railway Co. v. North Carolina*, 376 U. S. 93, 84 S. Ct. 564, 11 L. Ed. 2d 541 (1964) that it is their position that the 3-R and 4-R Acts do not change the substantive law to be applied by the ICC in determining whether to approve discontinuance. ConRail, by contrast, apparently takes the position that, under the 3-R Act, the

context of the present appeal, however, two additional problems remain. First, whatever the substantive law may be, this appeal relates solely to the necessary *procedures* which must be followed in discontinuing FSP passenger service. In other words, even if ConRail is right in asserting that the absence of a subsidy makes it absolutely entitled to discontinue the service, this would leave unanswered the question as to which procedure must be used in achieving that goal.

Second, under the current posture of the case, there has been no determination as to the actual extent of the deficit which ConRail is incurring in continuing this service. The plaintiffs dispute the fact that the operation is running at a deficit. We join the district court in expressing doubt as to whether the plaintiffs can seriously dispute the existence of a deficit. Nevertheless, the determination of the appropriate allocation of costs in determining whether this service runs at a deficit is a complex operation, and a hearing before the regulatory agency in the context of the normal discontinuance procedures would serve to clarify the extent of the deficit.

It should be noted that ConRail's construction of the statute is contrary to normal rules for construction of statutes. What was said in *United States v. Pritchett*, 152 U. S. App. D. C. 307, 311, 470 F. 2d 455, 459 (1972) is equally applicable here:

> Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote. This Rule of the Last Antecedent is not an inflexible rule, and is not applied where the context indicates otherwise. Since there is no such indication here, we conclude that the application of the rule would be in keeping with the intention expressed in this statute. (footnote omitted)

2. (Cont'd.)
only question for the ICC to decide would be whether ConRail is operating the service at an unsubsidized deficit. We do not decide this substantive question since, in our view, it is appropriate for this question to be left, in the first instance, to the regulatory agency.

Therefore, we hold that the reference in § 744(e)(2) to summary procedures modifies only the immediately proceeding clause, which deals with abandonment, and does not reach the more remote clause, which deals with discontinuance. In the absence of any indication that summary procedures should apply to discontinuance, the normal regulatory procedures under 49 U. S. C. § 13a(1) apply.

As noted, nothing in the legislative history directly addresses the question involved in this appeal. However, one reference in the legislative history should be considered even though it appears to contradict the language of the part of the statute which it discusses. 45 U. S. C. § 744(g), after the amendments of the 4-R Act, reads as follows:

> (g) Abandonment by Corporation.—After the rail system to be operated by the Corporation or a subsidiary thereof under the final system plan has been in operation for 2 years, the Commission may authorize the Corporation or a subsidiary thereof to abandon any rail properties as to which it determines that rail service over such properties is not required by the public convenience and necessity, if the Corporation or a subsidiary thereof can demonstrate that no State (or local or regional transportation authority) is willing to offer a rail service continuation payment pursuant to subsection (c) of this section. The Commission may, at any time after the effective date of the final system plan, authorize additional rail service in

> the region or authorize the abandonment of rail properties which are not being operated by the Corporation or any subsidiary or affiliate thereof or by any other person. Determinations by the Commission under this subsection shall be made pursuant to applicable provisions of the Interstate Commerce Act.

The language of this subsection prescribes normal ICC regulatory procedures with respect to the *abandonment* of rail service under the FSP. The subsection does not appear to discuss *discontinuance* of service on FSP lines. Nevertheless, the following statement, discussing this subsection, is found in S. Rep. No. 595 (Conference Report), 94th Cong. 222, *reprinted in* [1976] U. S. Code Cong. & Admin. News, pp. 14, 237:

> "(8) ConRail was required to provide service on all final system plan lines for 2 years, after which ConRail was subject to normal ICC abandonment and discontinuance procedures; . . . ."[3]

Of course, we need not determine the meaning of § 744(g), since it is not involved in this appeal. The quoted language from the Senate Report does, however, at the least tend to support the plaintiffs' position that Congress did not intend, in the 4-R Act, to allow summary discontinuance of FSP passenger service.

ConRail places some reliance on *Coleman v. Consolidated Rail Corp.*, 449 F. Supp. 621 (N. D. Ohio 1977). That case approved the summary discontinuance of passenger service over an FSP Line, at the end of the 180

3. A similar interpretation is found in Adams, *Railroad Revitalization and Regulatory Reform Act of 1976—An Interim Review*, 32 Business Lawyer 975, 998 (1977): "However, on all lines which it operates pursuant to the Final System Plan, ConRail is required to provide service for a minimum of two years. Thereafter it is subject to the normal discontinuance and abandonment procedures of the ICC."

day mandatory service period under 45 U. S. C. § 744 (e)(1). The very brief opinion in that case shows no evidence that the plaintiffs there argued that summary discontinuance of FSP lines was *not* permitted under § 744 (e)(2). Indeed, the court seems to have simply assumed that summary discontinuance was allowed. Under the circumstances, we do not deem the *Coleman* case to be persuasive.

Finally, we reiterate the fact that the FSP was specifically approved by Congress as part of the 4-R Act. The approval appears, as codified, at 45 U. S. C. § 718(d)(1). The FSP, at 1 FSP 46, makes the following statement, which is applicable to the service here in question:

> Services Never Covered by Leases or Contracts and Operated Over Lines to be Acquired by ConRail, Chessie or Amtrak
>
> The services will be continued on the day of conveyance USRA recommends that ConRail seek a satisfactory subsidy arrangement for provisions of these services. If such agreements have not been executed by time of conveyance, USRA recommends that ConRail post these services for discontinuance. *Approval for such discontinuances must be obtained from the proper regulatory authorities.* (Emphasis added.)

Similarly, the "Evaluation of the U. S. Railway Association's Final System Plan" (Interstate Commerce Commission, August 25, 1975) states, at p. 20, "Any proposed discontinuance of such services would require approval by the proper regulatory agencies in the normal manner." Undoubtedly, counsel for ConRail was correct, in his contention made at oral argument, that the "approval" of the FSP by Congress does not amount to the enactment of the FSP into positive law. On the other hand, the reference in the FSP to the "proper regulatory authorities" can be

taken as some indication of what Congress had in mind. We do not give undue weight to this factor, as we realize that both the FSP, and the USRA "Evaluation" quoted above were prepared *prior* to the enactment of the 4-R Act, at a time when the reference to the "proper regulatory authorities" was, without dispute, correct. Nevertheless, the approval of the FSP by Congress, as written, in the 4-R Act, does tend to undercut ConRail's position in this case. This, taken along with the other factors which we have mentioned, persuades us that summary discontinuance of FSP passenger service is not allowed under the 3-R and 4-R Acts.

It should be emphasized that the choice in this case is not one between a simple, expedited discontinuance procedure on the one hand, and an endlessly cumbersome regulatory process on the other. The summary discontinuance procedure which ConRail attempted to use in this case involved the posting of notices 60 days prior to the anticipated discontinuance. The I. C. C. procedure under 49 U. S. C. § 13a(1) also presents a relatively speedy mode of discontinuance, since the Commission must act on the proposed discontinuance within a period of not more than four months after the date when the discontinuance would otherwise have become effective.

We conclude, therefore, that 45 U. S. C. § 744 does not authorize ConRail summarily to discontinue rail passenger service over an FSP line. Accordingly, the notices posted and served under that section are ineffective to discontinue the service. The judgment of the district court, which dismissed the complaint of the plaintiffs, is Reversed, and the cause is Remanded with instructions to enter a permanent injunction in favor of the plaintiffs, prohibiting ConRail from discontinuing rail passenger service over the Valparaiso, Indiana to Chicago route under the summary procedures of 45 U. S. C. § 744(a).

BAUER, Circuit Judge, dissenting.

I respectfully dissent. In dismissing the complaint herein, Judge Will entered a well-reasoned and, to me, persuasive opinion in which he discusses both § 744(e)(2) and § 744(a)(1). He then states:

> Given this unambiguous statutory language, it is clear that Congress, with respect to passenger rail service, altered the distinction made in § 304(a) of the 3-R Act between final system plan and non-final system plan lines. This specific statutory directive takes precedence over the inconsistent language in the *earlier* written Final System Plan notwithstanding the fact that Congress "approved" the Final System Plan in the 4-R Act. See 4-R Act § 601(e), 45 U. S. C. § 718(d)(1). Such general approval cannot be construed to override or condition the specific statutory framework of § 744(e). See, e.g., *Monte Vista Lodge v. Guardian Life Ins. Co. of America*, 384 F. 2d 126, 129 (9th Cir. 1967).

Later, Judge Will concludes:

> In sum, we hold that ConRail was entitled to use the notice procedures of § 744(a)(1) by virtue of the direct statutory mandate in § 744(e)(2) and (4). No question has been raised with respect to ConRail's compliance with the § 744(a)(1) procedures. More importantly, since August 1, 1978, no transportation authority has offered to make the continued subsidy payments required under § 744(e). Accordingly, ConRail may discontinue the service.

In an argument over statutory construction of an enactment that I conceive to be poorly drawn, I believe that the opinion of the trial court is sounder than the majority opinion of this court. I would affirm.

45 U. S. C.

§ 744. Termination and continuation of rail services

(a) Discontinuance.—(1) Except as provided in subsections (c) and (f) of this section, rail service on rail properties of a railroad in reorganization in the region, or of a person leased, operated, or controlled by such a railroad, which transfers to the Corporation or to profitable railroads operating in the region all or substantially all of its rail properties designated for such conveyance in the final system plan, and rail service on rail properties of a profitable railroad operating in the region which transfers substantially all of its rail properties to the Corporation or to other railroads pursuant to the final system plan, may be discontinued, to the extent such discontinuance is not precluded by the terms of the leases and agreements referred to in section 743(b)(2) of this title, if—

(A) the final system plan does not designate rail service to be operated over such rail properties;

(B) not sooner than 30 days following the effective date of the final system plan, the trustee or trustees of the applicable railroad in reorganization or a profitable railroad give notice in writing of intent to discontinue such service on a date certain which is not less than 60 days after the date of such notice or on the date of any conveyance ordered by the special court pursuant to section 743(b)(1) of this title, whichever is later; and

(C) the notice required by subparagraph (B) of this paragraph is sent by certified mail to the Commission; to the chief executive officer, the transportation agencies, and the government of each political subdivision of each State in which such rail properties

are located; and to each shipper who has used such rail service during the previous 12 months.

(2)(A) If rail properties are not, in accordance with the designations in the final system plan, required to be operated, as a consequence of a recommended arrangement for joint use or operation of rail properties (under section 716(g) of this title) or as part of a coordination project (under sections 716(c) and (g) of this title), rail service on such properties may be discontinued, subsequent to the date of conveyance of rail properties pursuant to such section 743(b)(1) of this title, if the Commission determines that such rail service on such rail properties is not compensatory and if—

(i) the petitioner and any other railroad involved in such arrangement or coordination project have, prior to filing an application for such discontinuance, entered into a binding agreement (effective on or before the effective date of such discontinuance) to carry out such arrangement or project;

(ii) such application is filed with the Commission not later than 1 year after the effective date of the final system plan; and

(iii) such discontinuance is not precluded by the terms of the leases and agreements referred to in such section 743(b)(2) of this title.

(B) For purposes of this paragraph, rail service on rail properties is compensatory if the revenue attributable to such properties from such service equals or exceeds the sum of the avoidable costs of providing such service on such properties plus a reasonable return on the value of such rail properties, as determined in accordance with the

standards developed pursuant to section 715(d)(6) of this title.

(C) The Commission shall make its final determination, with respect to any discontinuance requested under this paragraph, not later than 120 days after the date of filing of an application therefor. The applicant shall have the burden of proving that the service involved is not compensatory. If the Commission fails to make a final determination within such time, the application shall be deemed to be granted.

(D) The Commission may issue such rules, regulations, and procedures as it deems necessary for the conduct of its functions under this paragraph.

(b) Abandonment.—(1) Except as provided in subsections (c) and (f) of this section, rail properties over which rail service has been discontinued under subsection (a) of this section may not be abandoned sooner than 120 days after the effective date of the discontinuance. Thereafter, except as provided in subsection (c) of this section, such rail properties may be abandoned upon 30 days' notice in writing to any person (including a government entity) required to receive notice under subsection (a)(1)(C) of this section.

(2) In any case in which rail properties proposed to be abandoned under this section are designated by the final system plan as rail properties which are suitable for use for other public purposes (including roads or highways, other forms of mass transportation, conservation, and recreation), such rail properties shall not be sold, leased, exchanged, or otherwise disposed of during the 240-day period beginning on the date of notice of proposed abandonment under this section unless such rail properties have

first been offered, upon reasonable terms, for acquisition for public purposes.

(3) Rail service may be discontinued, under subsection (a) of this section, and rail properties may be abandoned, under this section, notwithstanding any provision of the Interstate Commerce Act, the constitution or law of any State, or the decision of any court or administrative agency of the United States or of any State.

(c) Continuation of rail services.—No rail service may be discontinued and no rail properties may be abandoned, pursuant to this section—

(1) in the case of service and properties referred to in subsections (a)(1) and (b)(1) of this section, after 2 years from the effective date of the final system plan or more than 2 years after the date on which the final rail service continuation payment is received, whichever is later; or

(2) if a financially responsible person (including a government entity) offers—

(A) to provide a rail service continuation payment which is designed to cover the difference between the revenue attributable to such rail properties and the avoidable costs of providing rail service on such properties, together with a reasonable return on the value of such properties;

(B) to provide a rail service continuation payment which is payable pursuant to a lease or agreement with a State or with a local or regional transportation authority under which financial support was being provided on January 2, 1974 for the continuation of rail passenger service; or

(C) to purchase, pursuant to subsection (f) of this section, such rail properties in order to operate rail services thereon.

If a rail continuation payment is offered, pursuant to paragraph (2)(A) of this subsection, for both freight and passenger service on the same rail properties, the owner of such properties may not be entitled to more than one payment of a reasonable return on the value of such properties.

(d) Rail freight service.—(1) If a rail service continuation payment is offered, pursuant to subsection (c)(2)(A) of this section, for rail freight service, the person offering such payment shall designate the operator of such service and enter into an operating agreement with such operator. The person offering such payment shall designate as the operator of such service—

(A) the Corporation, if rail properties of the Corporation connect with the line of railroad involved, unless the Commission determines that such rail service continuation could be performed more efficiently and economically by another railroad;

(B) any other railroad whose rail properties connect with such line, if the Corporation's rail properties do not so connect or if the Commission makes a determination in accordance with subparagraph (A) of this paragraph; or

(C) any responsible person (including a government entity) which is willing to operate rail service over such rail properties.

A designated railroad may refuse to enter into such an operating agreement only if the Commission determines, on petition by any affected party, that the agreement would

substantially impair such railroad's ability to serve adequately its own patrons or to meet its outstanding common carrier obligations. The designated operator shall, pursuant to each such operating agreement (i) be obligated to operate rail freight service on such rail properties, and (ii) be entitled to receive, from the person offering such payment, the difference between the revenue attributable to such properties and the avoidable costs of providing service on such rail properties, together with a reasonable management fee, as determined by the Office.

(2) The trustees of a railroad in reorganization shall permit rail service to be continued on any rail properties with respect to which a rail service continuation payment operating agreement has been entered into under this subsection. Such trustees shall receive a reasonable return on the value of such properties, as determined in accordance with the standards developed pursuant to section 715(d)(6) of this title.

(3) If necessary to prevent any disruption or loss of rail service, at any time after the date of conveyance, pursuant to section 743(b)(1) of this title, the Commission—

(A) shall take such action as may be appropriate under its existing authority (including the enforcement of common carrier requirements applicable to railroads in reorganization in the region) to ensure compliance with obligations imposed under this subsection; and

(B) shall have authority, in accordance with the provisions of section 1(16)(b) of Title 49, to direct rail service to be provided by any designated railroad or by the trustees of a railroad in reorganization in the region, if a rail service continuation payment has been

offered but an applicable operating or lease agreement is not in effect.

For purposes of the preceding sentence, any compensation required as a result of such directed service shall be determined in accordance with the standards developed pursuant to section 715(d)(6) of this title. The district courts of the United States shall have jurisdiction, upon petition by the Commission or any interested person (including a government entity), to enforce any order of the Commission issued pursuant to the exercise of its authority under this subsection, or to enjoin any designated entity or the trustees of a railroad in reorganization in the region from refusing to comply with the provisions of this subsection.

(4) No determination of reasonable payment for the use of rail properties in reorganization in the region, and no determination of value of rail properties of such a railroad (including supporting or related documents or reports of any kind) which is made in connection with any lease agreement, contract of sale, or other agreement or understanding which is entered into after October 19, 1976—

(A) pursuant to this section; or

(B) pursuant to section 562 of this title or section 1613 of Title 49,

shall be admitted as evidence, or used for any other purpose, in any civil action, or any other proceeding for damages or compensation, arising under this chapter.

(e) Rail passenger service.—(1) The Corporation (or a profitable railroad) shall provide rail passenger service for a period of 180 days immediately following the date of conveyance (pursuant to section 743(b)(1) of this title),

with respect to any rail properties over which a railroad in reorganization in the region, or a person leased, operated, or controlled by such a railroad, was providing rail passenger service immediately prior to such date of conveyance. Such service shall be provided on such properties regardless of whether or not such properties are designated in the final system plan as rail properties over which rail service is required to be operated, except with respect to properties over which such service is provided by the National Railroad Passenger Corporation.

(2) If a State (or a local or regional transportation authority) was providing financial assistance to support the operation of rail passenger service, pursuant to a lease or agreement which was in effect immediately prior to the date of conveyance (pursuant to such section 743(b)(1) of this title, the Corporation (or a profitable railroad) shall be bound by the service provisions of such lease or agreement for the duration of the 180-day mandatory operation period specified in paragraph (1) of this subsection. If a State or such an authority was providing financial assistance for the continuation of rail passenger service on rail properties immediately prior to such date of conveyance, it shall provide the same level of financial assistance during such 180-day mandatory operation period. If no such financial assistance was being provided or if no such lease or agreement was in effect immediately prior to such date of conveyance, with respect to any such rail properties, the Corporation (or a profitable railroad) shall provide the same level of rail passenger service, for the duration of such 180-day mandatory operation period, that was provided prior to such date by the applicable railroad. If—

(A) such financial assistance is not provided;

(B) a State (or a local or regional transportation authority) has not, by the end of such 180-day mandatory operation period, offered a rail service continuation payment pursuant to subsection (c)(2)(A) of this section;

(C) an applicable rail service continuation payment pursuant to such subsection (c)(2)(A) of this section is not paid when it is due; or

(D) a payment required under a lease or agreement, pursuant to section 743(b)(2) of this title or subsection (c)(2)(B) of this section, is not paid when it is due,

the Corporation (or, where applicable, the National Railroad Passenger Corporation, a profitable railroad, or the trustee or trustees of a railroad in reorganization in the region) may (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the final system plan, abandon such properties, pursuant to subsections (a) and (b) of this section.

(3) Nothing in this subsection shall be construed to affect the obligation of the Corporation (or a profitable railroad), or of the trustees of the railroads in reorganization in the region, to provide rail passenger service pursuant to section 743(b)(2) of this title or subsection (c)(2)(B) of this section.

(4) If a State (or a local or regional transportation authority)—

(A) offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of the section and under regulations issued by the Office pursuant to section 715(d)(5) of this title, for the operation of rail passenger service after the 180-day mandatory operation period, and

(B) provides compensation, pursuant to paragraph (2) of this subsection, for operations conducted during the 180-day mandatory operation period; or

(C) offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of this section and regulations issued by the Office pursuant to section 715(d)(5) of this title, for the operation of rail passenger service provided under an agreement or lease pursuant to section 743(b)(2) of this title or subsection (c)(2)(B) of this section where such offer is made for the continuation of the service beyond the period required by such agreement or lease, except that such services shall not be eligible for assistance under section 1613(a)(2) of Title 49.

the Corporation (or a profitable railroad) shall continue to provide such service after the end of such period, except as otherwise provided in this subsection.

(5)(A) The Secretary shall reimburse the Corporation (or a profitable railroad) for any loss which is incurred by it during the 180-day mandatory operation period specified in paragraph (1) of this subsection which is not compensated for by a State (or a local or regional transportation authority). The amount of such reimbursements shall be determined pursuant to section 1613(a)(1) of Title 49 and under regulations issued by the Office pursuant to section 715(d)(5) of this title.

(B) The Secretary shall reimburse States, local public bodies, and agencies thereof for additional costs incurred by such States, bodies, and agencies for rail service continuation payments for rail passenger service pursuant to section 1613(a)(2) of Title 49 and under regulations issued by the Office pursuant to section 715(d)(5) of this title.

(C) For purposes of the obligation of the Secretary to reimburse the Corporation (or a profitable railroad) or States, local public bodies, and agencies thereof under subparagraphs (A) and (B) of this paragraph, the level of rail passenger service shall be determined on the basis of train miles, car miles, or some other appropriate indicia of scheduled train movements. Programs to correct deferred maintenance on rolling stock, right-of-way, and other facilities which are designed to maintain service, meet on-time performance, and maintain a reasonable degree of passenger comfort (and costs incurred incident thereto) shall be included within the meaning of the term "loss" as used in subparagrhph (A) of this paragraph and within the meaning of the term "additional costs" as used in subparagraph (B) of this paragraph and section 1613(a)(2) of Title 49.

(D) If a dispute arises with respect to the application of any such regulations, the parties to such dispute may submit such dispute to arbitration by a third party. If the parties are unable to agree upon the selection of an arbitrator, the Chairman of the Commission shall serve in that capacity (except as to matters required to be decided by the Commission, pursuant to section 562(a) of this title).

(6) Notwithstanding any other provision of this subsection, the Corporation is not obligated to provide rail passenger service on rail properties if a State (or a local or regional transportation authority) contracts for such service to be provided on such properties by an operator other than the Corporation, except that the Corporation shall, where appropriate, provide such operator with access to such properties for such purpose.

(7)(A) If a state (or a local or regional transportation authority) in the region offers to provide payment for the provision of additional rail passenger service, the Corporation shall undertake to provide such service pursuant to this subsection (including the discontinuance provisions of paragraph (2) of this subsection). An offer to provide payment for the provision of additional rail passenger service shall be made in accordance with subsection (c)(2)(A) of this section and under regulations issued by the Office pursuant to section 715(d)(5) of this title, and shall be designed to avoid any additional costs to the Corporation arising from the construction or modification of capital facilities or from any additional operating delays or costs arising from the absence of such construction or modification. The State (or local or regional transportation authority) shall demonstrate that it has acquired, leased, or otherwise obtained access to all rail properties, other than those designated for conveyance to the National Railroad Passenger Corporation pursuant to sections 716(c)(1)(C) and 716(c)(1)(D) of this title and to the Corporation pursuant to section 743(b)(1) of this title, necessary to provide the additional rail passenger service and that it has completed, or will complete prior to the inception of the additional rail service, all capital improvements necessary to avoid significant costs which cannot be avoided by improved scheduling or other means on other existing rail services (including rail freight service) and to assure that the additional service will not detract from the level and quality of existing rail passenger and freight service.

(B) As used in this paragraph, the term "additional rail passenger service" means rail passenger service (other than rail passenger service provided pursuant to the provisions of paragraphs (2) and (4) of this subsection), including extended or expanded service and modified routings, which is to be provided over rail properties conveyed to the Corporation pursuant to section 743(b)(1) of this title, or over (i) rail properties contiguous thereto con-

veyed to the National Railroad Passenger Corporation pursuant to this chapter, or (ii) any other rail properties contiguous thereto to which a State (or local or regional transportation authority) has obtained access.

(C) Notwithstanding any other provision of this paragraph, the Corporation shall not be required to operate additional rail passenger service over rail properties leased or acquired from or owned or leased by a profitable railroad in the region.

(8) The Secretary shall, in consultation with the Association, conduct a study to determine the best means of compensating the Corporation for liabilities which it may incur for damages to persons or property, resulting from the operation of rail passenger service required to be operated pursuant to this subsection or section 743(b)(2) of this title, which are not underwritten by private insurance carriers or are not indemnified by a State (or local or regional transportation authority). Such study shall identify the nature of the risks to the Corporation, the probable degree of uninsurability of such risks, and the desirability and feasibility of various indemnification programs, including subsidy offers made pursuant to this section, self-insurance through a passenger tax or other mechanism, or government indemnification for such liabilities. Within one year after November 8, 1978, the Secretary shall prepare a report with appropriate recommendations and shall submit such report to the Congress. Such report shall specify the most appropriate means of indemnifying the Corporation for such liabilities in a manner which shall prevent the cross-subsidization of passenger services with revenues from freight services operated by the Corporation.

(f) Purchase.—If an offer to purchase is made under subsection (c)(2)(C) of this section, such offer shall be

accompanied by an offer of a rail service continuation payment. Such payment shall continue until the purchase transaction is completed, unless a railroad assumes operations over such rail properties of its own account pursuant to an order or authorization of the Commission. Whenever a railroad in reorganization in the region or a profitable railroad gives notice of intent to discontinue service pursuant to subsection (a) of this section, such railroad shall, upon the request of anyone apparently qualified to make an offer to purchase or to provide a rail service continuation payment, promptly make available its most recent reports on the physical condition of such property, together with such traffic and revenue data as would be required under subpart B of part 1121 of chapter X of Title 49 of the Code of Federal Regulations and such other data as are necessary to ascertain the avoidable costs of providing service over such rail properties.

(g) Abandonment by corporation.—After the rail system to be operated by the Corporation or a subsidiary thereof under the final system plan has been in operation for 2 years, the Commission may authorize the Corporation or a subsidiary thereof to abandon any rail properties as to which it determines that rail service over such properties is not required by the public convenience and necessity, if the Corporation or a subsidiary thereof can demonstrate that no State (or local or regional transportation authority) is willing to offer a rail service continuation payment pursuant to subsection (c) of this section. The Commission may, at any time after the effective date of the final system plan, authorize additional rail service in the region or authorize the abandonment of rail properties which are not being operated by the Corporation or any subsidiary or affiliate thereof or by any other person. Determinations by the Commission under this subsection shall be made

pursuant to applicable provisions of the Interstate Commerce Act.

(h) Interim abandonment.—After February 5, 1976, and prior to the date of conveyance (pursuant to section 743(b)(1) of this title), no railroad in reorganization in the region may discontinue service or abandon any line of railroad other than in accordance with the provisions of this chapter, unless (1) it is authorized to do so by the Association, and (2) no affected State (or local or regional transportation authority) reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or the decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority.

(i) Disposition of designated rail properties.—No railroad in reorganization in the region and no person leased, operated or controlled by such a railroad shall sell, transfer, encumber, or otherwise dispose of rail property, or any right or interest therein, designated for transfer to the Corporation or conveyance to a profitable railroad in the final system plan, except pursuant to section 743(b) of this title. The provisions of this subsection shall not apply to any such sale, transfer, encumbrance, or other disposition—

(1) as to which the Association generally or specifically consents in writing;

(2) which, prior to February 5, 1976, had been specifically approved by a United States district court having jurisdiction over the reorganization of a railroad in reorganization under section 205 of Title 11; or

(3) following certification to the special court, pursuant to section 719(c) of this title, of any such rail properties not previously so certified.

Supreme Court, U. S.
FILED
MAY 29 1979
MICHAEL RODAK, JR., CLERK

No. 78-1630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATEMENT	2
ConRail's New Notice	6
ARGUMENT	7
CONCLUSION	12
APPENDIX:	
Finance Docket No. 29021F, Consolidated Rail Corporation (ConRail) – Discontinuance of Passenger Trains Nos. 453-456 Between Valparaiso, IN, and Chicago, IL., decision of the Interstate Commerce Commission, dated May 7, 1979 (served May 9)	1a
Finance Docket No. 29021F, Consolidated Rail Corporation (ConRail) – Discontinuance of Passenger Trains Nos. 453-456 Between Valparaiso, IN and Chicago, IL, order of the Interstate Commerce Commission, dated May 17, 1979 (served May 22)	4a

CITATIONS

Cases:

Amer. Const. Co. v. Jacksonville Railway,
148 U.S. 372 (1893) 8

City of Chicago v. United States,
396 U.S. 162 (1969) 2

Estelle v. Gamble,
429 U.S. 97 (1976) 8

Firemen v. Bangor & A.R. Co.,
389 U.S. 327 (1967) 8

Hamilton Shoe Co. v. Wolf Brothers,
240 U.S. 251 (1916) 8

New Jersey v. United States,
168 F. Supp. 324 (D.N.J. 1959),
aff'd 359 U.S. 27 2

Pennsylvania R. Co. Discontinuance – Chicago & Valparaiso, 331 I.C.C. 464 (1968). 2

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 2

Singer v. United States,
323 U.S. 338 (1945) 10

Southern R. Co. v. North Carolina,
376 U.S. 93 (1964) 2

United States v. Pritchett,
470 F.2d 455 (D.C. Cir. 1972) 6

Statutes:

Interstate Commerce Act, Title 49 U.S.C.
Section 10908 . . . . . 2, 6, 7

Judicial Code, Title 28 U.S.C.
Section 1254 1
Section 2341 7

Regional Rail Reorganization Act, Title 45 U.S.C.
Section 527 4
Section 718 5
Section 742 6
Section 744 . . . . . 3, 5, 6, 7, 9, 11

Miscellaneous:

Corpus Juris Secundum 10

Sutherland, Statutory Construction (4th Ed. 1973) 6, 10

United States Railway Association, Preliminary System Plan, 40 Fed. Register 9321 (1975) 5

United States Railway Association, Final System Plan (1975). 3, 4, 5, 8, 11

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OCTOBER TERM, 1978

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CONSOLIDATED RAIL CORPORATION,
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v.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet., A11-A27) is reported at 589 F.2d 1327. The opinion of the district court is not reported. (Pet., A1-A10).

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1978. A petition for rehearing was denied January 25, 1979. The petition for writ of certiorari was filed April 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether ConRail is entitled to discontinue its Chicago, Ill.-Valparaiso, Ind. passenger train service simply by posting notice of the discontinuance for 60 days, and by notifying certain parties of the discontinuance, under 45 U.S.C. 744(a)(1), or whether ConRail is required to apply to the Interstate Commerce Commission ("I.C.C.") under 49 U.S.C. 13a(1) (or to the appropriate state regulatory agencies).

STATEMENT

This proceeding involves the proposed discontinuance of two pairs of railroad commuter passenger trains between Valparaiso, Ind. and Chicago, Ill., a distance of 44 miles. Two trains operate from Valparaiso to Chicago in the morning, and two trains return from Chicago to Valparaiso in the evening.[1]

The most recent attempt to discontinue part of this passenger train service, prior to enactment of Regional Rail Reorganization Act of 1973 ("3-R Act"),[2] was denied by the I.C.C. in the customary section 13a(1) case under the Interstate Commerce Act. 49 U.S.C. 13a(1).[3] *Pennsylvania R. Co. Discontinuance-Chicago & Valparaiso*, 331 I.C.C. 464 (1968).

[1] Respondents herein are People of the State of Illinois (William J. Scott, Attorney General), Illinois Commerce Commission, City of Chicago, Chicago-Indiana Railroad Commuter Association, and United Transportation Union (John W. McGinness and George B. Lee).

[2] P.L. 93-236 (January 2, 1974). For an understanding of the 3-R Act, generally, see: *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

[3] Recodified as 49 U.S.C. 10908 (P.L. 95-473, October 17, 1978). Congress in 1958 enacted secton 13a to expedite passenger train discontinuance proceedings. See: *New Jersey v. United States*, 168 F. Supp. 324 (D.N.J. 1959), aff'd 359 U.S. 27; *City of Chicago v. United States*, 396 U.S. 162 (1969); *Southern R. Co. v. North Carolina*, 376 U.S. 93 (1964).

However, at the time of the court's decision below, Consolidated Rail Corporation ("ConRail"), successor to the former Penn Cantral Transportation Company's operation of the trains, had not invoked the jurisdiction of the I.C.C. for discontinuance of the trains; likewise, the carrier had not taken the alternative course of seeking approval from each of the state regulatory commissions in Illinois and Indiana, i.e., the Illinois Commerce Commission and the Indiana Public Service Commission.[4] Instead, ConRail posted a summary 60-day passenger train discontinuance notice, proposing to discontinue the trains by its own fiat, asserting its sole managerial prerogative, relying upon section 304 of the 3-R Act. 45 U.S.C. 744.

The court of appeals ruled that the summary discontinuance procedures of section 304(a) are not directly applicable to the Chicago-Valparaiso line because section 304(a) expressly excludes from its scope rail properties which the Final System Plan ("FSP"), promulgated by United States Railway Association ("USRA"), designated to be operated by ConRail. The FSP specified that Penn Central's Chicago-Valparaiso line be conveyed to ConRail. Moreover, the FSP specifically mentioned the Chicago-Valparaiso passenger trains, as subject to discontinuance only upon approval from the proper regulatory authorities. I FSP 46 (Pet., A25):

> "Services Never Covered by Leases or Contracts and Operated Over Lines to be Acquired by ConRail, Chessie or Amtrak.

[4] Pet., A12, A13.

"These services will be continued on the day of conveyance, USRA recommends that ConRail seek a satisfactory subsidy arrangement for provision of these services. If such agreements have not been executed by time of conveyance, USRA recomends that ConRail post these services for discontinuance. *Approval of such discontinuance must be obtained from the proper regulatory authorities.*" (emphasis supplied).

"The services along with the recommended owner of the property after conveyance are:

" *PC service between Chicago and Valparaiso, Ind. (ConRail)."

The FSP was issued July 25, 1975. The I.C.C. on August 25, 1975 issued its "Evaluation of the U.S. Railway Association's Final System Plan",[5] and interpreted the FSP as specifying that discontinuance of commuter service operated on a FSP line would require approval by the proper regulatory agencies in the normal manner. I.C.C. Evaluation p. 20 (Pet., A25):

". . . if commuter service is operated on a line which is included in the Final System Plan, the Act requires that this commuter service be continued whether it is subsidized or not. *Any proposed discontinuance of such services would require approval by the proper regulatory agencies in the normal manner.*" (emphasis supplied).

ConRail's argument in support of the summary discontinuance procedures of section 304(a) of the 3-R Act, rather

[5] The I.C.C.'s evaluation of the FSP was mandated by section 207(d) of the 3-R Act. 45 U.S.C. 527(d).

than the normal discontinuance procedures under the Interstate Commerce Act and state laws, rests upon the amendment made to section 304 of the 3-R Act by the so-called Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act").[6] Congress added a subsection 304(e) and reenacted the entire section 304 by means of section 804 of the "4-R Act". The same 4-R Act expressly approved the FSP. See: 45 U.S.C. 718(d)(1), 744.

The Court of Appeals correctly construed and harmonized the involved statutory provisions. Moreover, the motivation for enactment of section 304(e) was to provide for continuation of passenger service on *non*-final system lines. The vast preponderance of rail commuter service operated by ConRail's predecessors (Penn Central, Reading, Jersey Central and Erie Lackawanna) was provided by those railroads under subsidy contracts at the time the FSP was issued on July 25, 1975. It appeared that the only commuter trains not under some contract constituted less than one percent of the service, and embraced the 4 involved trains between Valparaiso-Chicago., 4 trains between Baltimore-Washington, 4 trains between Philadelphia-Newark, and 2 trains between Cleveland-Youngstown. In contrast with these 14 trains, an additional 1,727 commuter trains were operated under subsidy contract in Boston, New York, and Philadelphia. (Preliminary System Plan, at 171, 174; 40 Fed. Reg. 9321, 9503, 9506).

Although the FSP presented no difficulties for the Chicago-Valparaiso service, because the line was included in the FSP for conveyance to ConRail, there were problems in the East because the FSP excluded virtually all lines leading into the major Eastern passenger terminals. Moreover, the "leases

[6] P.L. 94-210. 90 Stat. 31. (February 5, 1976).

and agreements" exemption of section 302(b)(2) of the 3-R Act, 45 U.S.C. 742(b)(2), was construed narrowly, so as not to embrace the year-to-year contracts of many commuter authorities. I FSP 44-46.

The response by Congress was a re-enactment of section 304 of the 3-R Act, with a new subsection 304(e), as part of the 4-R Act, to deal with passenger service on the *non*-FSP lines.[7] But this did not change the necessity for regulatory approval for the discontinuance of service on FSP lines.

Finally, we note that in interpreting the specific statutory language claimed by ConRail to support summary discontinuance, i.e., section 304(e)(2) and 304(e)(4), 45 U.S.C. 744(e)(2)(4), the court of appeals gave weight to the Rule of the Last Antecedent. (Pet., A18-A19, A22-A23). This rule has a firm federal base in the interpretation of statutes. *United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972); Sutherland, *Statutory Construction*, Section 47.33 (4th Ed. 1973).

ConRail's New Notice

ConRail on April 17, 1979, just 8 days prior to filing its petition for a writ of certiorari, invoked the jurisdiction of the I.C.C. by filing a notice and supporting statement with the I.C.C., proposing to discontinue these Valparaiso-Chicago trains under the former section 13a(1) of the Interstate Commerce Act, now 49 U.S.C. 10908.[8] The I.C.C. on May 7, 1979 (served May 9), instituted an investigation into the proposed discontinuance.[9] By further order, the I.C.C. on May 17, 1979 (served May 22) has set a series of hearings on the proposed discontinuance.[10]

Although invoking the I.C.C.'s jurisdiction, ConRail continues to urge that the proposed discontinuance is governed by section 304 of the Rail Act, rather than by 49 U.S.C. 10908. The I.C.C.'s order of May 7 acknowledges the issue, and presumably the I.C.C. prior to September 21, 1979, will present its own views as part of its decision.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. ConRail's recent filing with the I.C.C., and the latter's institution of an investigation concerning the Chciago-Valparaiso proposed discontinuances, may have served to render the judgment of the Court of Appeals interlocutory in nature. The I.C.C.'s ultimate decision presumably will constitute a determination by that agency as to its own jurisdiction, and will consider other matters. ConRail thus wishes to have two strings to its bow, one before this Court and the other before the I.C.C., with the latter's decision subject to statutory review in the Court of Appeals. 28 U.S.C. 2341, et seq. (See pp. 1a-3a, *infra*.)

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[7] The Congress carefully considered the FSP with respect to commuter service, including the I.C.C.'s evaluation. Extensive hearings were held on this subject. There is no indication that Congress sought to change the requirement that discontinuance of service on FSP lines could be achieved without resort to regulatory approval.

[8] Petitioner alluded to this filing. (Pet., 4 fn. 2).

[9] The May 7 decision is set forth herein, *infra*, at pp. 1a-3a. The I.C.C. ordered ConRail to continue operation of the trains pending completion of the investigation, but not beyond September 21, 1979.

[10] The May 17 order is set forth herein, *infra*, at pp. 4a-6a.

This Court has a normal practice of denying interlocutory review. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting); *Firemen v. Bangor & A.R. Co.*, 389 U.S. 327 (1967); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-58 (1916). The Court in *Amer. Const. Co. v. Jacksonville Railway*, 148 U.S. 372, 384 (1893), stated ". . . and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." Here, a finding by the I.C.C. that the Chicago-Valparaiso service is not performed at an avoidable loss would moot all of ConRail's arguments.

2. ConRail has failed to demonstrate the principal point urged in its petition, i.e., that the decision below raises a novel question which threatens the integrity of the intent of Congress (Pet., 5-8). ConRail has failed to show any other commuter service which is operated wholly on FSP lines; and the FSP does not indicate any other such service, apart from the 10 trains listed in the FSP which are in addition to the Chicago-Valparaiso service. ConRail's fear, expressed in its petition at pp. 6-7, is with respect to "mixed" service, i.e., where a given passenger train in the course of a single trip operates over a route comprised of both FSP and non-FSP lines. But such "mixed" trains are not in issue.

Moreover, any disagreements between ConRail and Southeastern Pennsylvania Transportation Authority ("SEPTA"), pending in the Third Circuit, should not be anticipated or litigated as part of this isolated Chicago-Valparaiso service, which exists alone and hundreds of miles apart from ConRail's commuter rail complex on the eastern seaboard.[11]

[11] Nos. 77-2420, 78-2245, and 79-1580, *Southeastern Pennsylvania Transportation Authority v. Interstate Commerce Commission.*

ConRail has not demonstrated the existence of any important federal question which could be settled by this court.

3. ConRail's arguments concerning the statutory provisions raise no controlling matters which were not encompassed in the decision by the court of appeals; however, we answer certain matters out of an abundance of caution.

ConRail for the first time asserts a purpose of the 4-R Act to "substitute competition for regulatory control", so as to relieve ConRail of a portion of federal regulation by the I.C.C. (Pet., 5-6).[12] The short answer is that the portion of the 4-R Act involving this Chicago-Valparaiso service does not deal with the ratemaking and regulatory reform portion of the 4-R Act, but instead is concerned with implementation of the FSP mandated by the 3-R Act (Title VI), and with Local Rail Service Continuation for lines excluded from the FSP (Title VIII).

ConRail errs in its concept of the statutory framework and interpretation. (Pet., 9-16). The court of appeals correctly observed that the final phrase in section 304(e)(2) refers to the last antecedent, i.e., abandonment, rather than to a discontinuance.[13] (Pet., A18-A19, A22-A23).

> . . . the Corporation . . . may (i) discontinue such rail passenger service, and (ii) with respect

[12] ConRail argues that the I.C.C.'s staff organization, Rail Service Planning Office ("RSPO") is to regulate commuter train service, in lieu of the I.C.C. or state regulatory commissions. (Pet., 5-8, 18). We cannot impute such an intention by the Congress to place the I.C.C.'s staff in control of the agency and above the agency on this matter.

[13] As observed by the court of appeals, a summary discontinuance under subsection (a) is *always* a prerequisite to summary abandonment under subsection (b). (Pet. A19 fn. 1).

> to rail properties not designated for inclusion in the final system plan, *abandon such properties pursuant to subsections (a) and (b) of this section,*

The rule of the last antecedent is stated in 82 C.J.S., Section 344:

> By what is known as the doctrine of "last antecedent", relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote; nor are they ordinarily to be construed as extending to following words.

Sutherland, *Statutory Construction* (4th Ed. 1973), Section 47.33:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of "the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence.

The California lower court decision cited by ConRail is simply wrong, and ConRail incorrectly reads the "conspiracy" clause as modifying the list of crimes in *Singer v. United States,* 323 U.S. 338, 341 (1945). (Pet., A13-A15 fn. 12).

A state or local subsidy for commuter service is not a *sine qua non* for ConRail's obligation to maintain commuter service, contrary to ConRail's argument. Moreover, the question of the substantive standard is not before the court.

(Pet., A21-A22). Rather, the standard is expressly now before the I.C.C., as stated in its order of May 7, 1979, *infra,* at pp. 1a-2a.

ConRail misreads section 304(g) of the 3-R Act, 45 U.S.C. 744(g). (Pet., 14-15). The import of section 304(g) is to impose a 2-year moratorium or "freeze" for the abandonment of property over which the I.C.C. has determined service is not required, such abandonment and discontinuance to he made under the applicable provisions of the Interstate Commerce Act. The key point is that section 304(g) illustrates that service included in the FSP–freight or passenger – is subject to the ordinary regulatory controls as in the case of any railroad proposing to discontinue or abandon railroad operations.

ConRail's argument that summary discontinuance can be construed from section 304(e)(4), by means of the proviso clause, was answered by the court of appeals. (Pet., 10, 15-16, A19-A20).

Finally, we wish to emphasize that the legislative re-enactment of section 304 of the 3-R Act, by means of section 804 of the 4-R Act, was made by the Congress after extensive hearings, with no attempt to alter the FSP's requirement that normal regulatory means are necessary to discontinue any passenger service specifically embraced within the FSP.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1979

DI Service Date May 9, 1979

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29021F[1]

CONSOLIDATED RAIL CORPORATION (CONRAIL)– DISCONTINUANCE OF PASSENGER TRAINS NOS'. 453-456 BETWEEN VALPARAISO, IN, AND CHICAGO, IL.

Decided: May 7, 1979

On April 17, 1979, the Consolidated Rail Corporation (ConRail) filed a notice and supporting statement seeking to discontinue certain rail passenger service pursuant to 49 U.S.C. 10908 and 49 C.F.R. Part 1122.

ConRail proposes to discontinue service on its passenger trains Nos. 453, 454, 455, and 456 between Valparaiso, IN, and Chicago, IL, effective May 21, 1979.

Complaints from concerned persons have been received requesting suspension of the proposed discontinuance pursuant to 49 U.S.C. 10908(b), pending an investigation to determine the extent of public need for the rail service.

We note that discontinuance of the rail passenger service may not be warranted by the public convenience and necessity. We further note that continued operation of the involved trains may not unduly burden interstate commerce. Thus, continued operation of the affected transportation may be appropriate under 49 U.S.C. 10908(c).

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[1] This proceeding stems out of an earlier ConRail discontinuance application in Finance Docket No. 28954F, which was rejected by the entire Commission for jurisdictional infirmities in *Consolidated Rail Corporation – Discontinuance*, 360 I.C.C. 108 (1979).

ConRail, however, contends that the proper standard for determining the appropriateness of the proposed discontinuance is not 49 U.S.C. 10908, but rather section 304 of the Regional Rail Reorganization Act of 1973 (3-R Act) (45 U.S.C. 744), and that the discontinuance should be summarily approved under that section. In the alternative, ConRail argues that the discontinuance would conform with 49 U.S.C. 10908(c), and that we should thus approve the discontinuance under that section without issuing an investigation or train-continuance order pursuant to 49 U.S.C. 10908(b).

Since ConRail's contentions raise significant issues regarding the proper standard governing the proposed discontinuance – and since the discontinuance may have serious effects on the public interest and the environment – we shall institute an investigation into the proposed discontinuance and order ConRail to continue the transportation pending completion of the investigation (but not to exceed 4 months from the proposed discontinuance date of May 21, 1979). *See* 49 U.S.C. 10908(b).

Due and timely execution of the Commission's functions in this proceeding requires the omission of an Administrative Law Judge's initial decision.

It is ordered:

(1) An investigation of the proposed discontinuance is instituted under 49 U.S.C. 10908(b), and the matter is assigned for hearing at a time and place to be fixed.

(2) The investigation shall embrace – and the parties shall be prepared to present evidence regarding – among other things, the feasibility of requiring total or partial continuance of the described rail service. Such inquiries regarding continued service shall include (but not be limited to): service over a segment of the route; weekend, seasonal, holiday, or special-run service; mixed passenger/freight service; or a combination of the foregoing or other limited services.

(3) The continued operation of trains Nos. 453, 454, 455, and 456 between Valparaiso, IN, and Chicago, IL, is required on their existing schedules and routes, pending hearing and decision in this investigation (but not for longer than 4 months beyond the proposed discontinuance date of May 21, 1979) unless otherwise subsequently ordered.

(4) An initial decision by an Administrative Law Judge is omitted, and the record shall be considered as certified to the Commission (Division 1) for initial decision.

By the Commission, Division 1, Commissioners Gresham, Brown, and Clapp.

H. G. HOMME, JR.
Secretary

(SEAL)

79-229

Service Date
May 22, 1979

ORDER

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29021F

CONSOLIDATED RAIL CORPORATION (CONRAIL)–
DISCONTINUANCE OF PASSENGER TRAINS
NOS. 453-456 BETWEEN VALPARAISO, IN
AND CHICAGO, IL

(Investigation under 49 USC 10908(b))

IT IS ORDERED:

That this proceeding is hereby referred to an Administrative Law Judge and assigned for hearing at the times and places designated below.

On June 25, 26, and 27, 1979, at 9:30 a.m. Local Time, at Chicago, Illinois, in a hearing room to be later designated, to hear evidence, presented by (1) the Consolidated Rail Corporation (Conrail) or persons supporting the proposals, including cross-examination thereon, (2) protestants, including cross-examination thereon, or (3) as may be directed by the Administrative Law Judge.

On June 27, 1979, at 7:00 p.m. Local Time at Whiting, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

On June 28, 1979, at 7:00 p.m. Local Time, at Gary, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

On June 29, 1979, at 7:00 p.m. Local Time, at Hobart, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

On June 30, 1979, at 10:00 a.m. Local Time, at Valparaiso, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

Consolidated Rail Corporation (Conrail) shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in its petition for authority to discontinue the above trains, and the exhibits attached thereto.

The carrier shall be prepared to present evidence on, among other things, all facts and matters (including applicable traffic, revenue, cost, and other data) pertaining to the feasibility of requiring the continuance in part of the said train service, including, but not limited to service over a segment of the route; week-end, seasonal, holiday, or special run service, or mixed passenger-freight service; or a combination of the foregoing or other limited service.

Any person desiring to cross-examine witnesses of the Consolidated Rail Corporation (Conrail) at designated locations of hearing other than at the place of initial hearing as ordered above shall either (1) prior to the initial hearing file with the Commission such a request along with the justification therefor and a certification that a copy thereof has been

served upon the railroad, or (2) appear at the initial hearing and justify such a request to the Administrative Law Judge. Such a request may be granted or denied by the Commission or the Administrative Law Judge.

A copy of the petition and all related exhibits shall be supplied by the carrier immediately upon request by any person expecting to actively participate in the hearing.

All written testimony, including exhibits, proposed to be offered at the hearing by the carrier, so far as practicable, shall be served on state regulatory bodies or others making requests of said carrier therefor. Written testimony and exhibits of protestants or state regulatory bodies, so far as practicable, shall be served on Consolidated Rail Corporation (Conrail). Service in each instance shall be made by depositing such documents as first-class mail not later than seven (7) days prior to the initial hearing which requirement may be waived by the Administrative Law Judge at the hearing, for good cause.

The Consolidated Rail Corporation (Conrail) shall, within 10 days of the service dateof this order, post a copy of this order in a conspicuous place in each station, depot, car, or other facility in which it is required to post a notice of the proposed change in service (49 C.F.R. 1122); and shall certify to this Commission, within 15 days of the service date of this order, that said posting has been made.

Dated at Washington, D.C., this 17th day of May 1979.

By the Commission, Robert N. Glennon, Chief Administrative Law Judge.

H. G. HOMME, JR.
Secretary

(SEAL)